TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

[redacted]

No. 274.

JEROME B. MORSE, APPELLANT

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

[redacted]

(22,644)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 274.

JEROME E. MORSE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print
Amended petition, filed March 25, 1911	1	1
Traverse	6	3
Argument and submission of case	6	3
Findings of fact and conclusion of law	7	4
Opinion of the court	9	6
Judgment of the court	12	8
Application for, and allowance of, appeal	12	8
Certificate of clerk	13	9

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 1, 1912.

1 In the Court of Claims.

No. 30,554.

JEROME E. MORSE
v.
THE UNITED STATES.

I. *Amended Petition.*

Filed March 25, 1911.

(Original Petition Filed November 26, 1909.)

To the Honorable the Court of Claims:

The claimant respectfully represents:

I. The Claimant entered the United States Navy as a midshipman on October 11, 1862, and has served continuously therein since that date. During the Civil War he served with credit otherwise than as a cadet prior to April 9, 1865.

While claimant was serving as a lieutenant, on July 23, 1874, the Secretary of the Navy directed the following letter to him:

"The Naval Retiring Board, before which you recently appeared, found you incapacitated for performing the duties of your office, and that the incapacity did not originate in the line of duty, and the President of the United States, concurring in opinion with the Board, has directed that you be retired on furlough pay. You will accordingly be considered as so retired from this date."

Since that date claimant has been borne on the Navy Register on the retired list.

On June 17, 1878, the claimant was transferred by the President, by and with the advice and consent of the Senate, from the furlough pay list to the fifty per centum retired pay list.

2 On June 10, 1902, Congress passed the following statute, 32 Stat. L. 1444:

"An Act for the Relief of Lieutenant Jerome E. Morse.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Navy be, and he is hereby, authorized and empowered to transfer Lieutenant Jerome E. Morse, of the retired list of the United States Navy, from the half-pay list to the seventy-five per centum pay list of retired officers, under section fifteen hundred and eighty-eight of the Revised Statutes of the United States; and the said transfer shall take effect as of the passage of this Act."

Claimant was transferred in accordance with said act. The reports of the committees of Congress, upon whose recommendation said act was passed, gave as the ground thereof that the disability on

account whereof claimant was retired, to wit, nearsightedness, was in fact incurred in the line of duty.

On January 18, 1907, the President nominated claimant to the Senate for advancement to the grade of lieutenant-commander on the retired list, in accordance with the act of June 29, 1906, 34 Stat. L. 554. Said nomination was in the following words (Congressional Record, 59th Congress, Second Session, Part 2, p. 1344):

"Lieut. Jerome E. Morse, United States Navy, retired, to be a lieutenant-commander on the retired list of the Navy, from the 29th day of June, 1906, in accordance with a provision in the naval appropriation act approved on that date."

On January 23, 1907, the Senate advised and consented to said advancement. The action of the Senate was in the following language (Congressional Record, 59th Congress, Second Session, Part 2, p. 1558):

"Lieut. Jerome E. Morse, United States Navy, retired,
3 to be a lieutenant-commander on the retired list of the Navy.
from the 29th day of June, 1906, in accordance with a provision contained in the naval appropriation act approved on that date."

On February 2, 1907, claimant was notified by the Secretary of the Navy that he had been so advanced.

II. The disability for which he was retired, nearsightedness, was incurred in the service.

III. On September 20, 1907, the Assistant Comptroller decided claimant was entitled to three-fourths the pay of a lieutenant-commander upon the active list of over ten years' service, from June 29, 1906, and he was accordingly so paid (14 Comp. Dec. 161). Subsequently, on March 29, 1909, the Assistant Comptroller of his own motion reversed said decision, and held claimant entitled only to three-fourths the pay of a lieutenant on the active list of over ten years' service (15 Comp. Dec. 584). The difference between the two rates of pay, amounting to one thousand three hundred dollars ($1,300) was accordingly checked against claimant's current pay; and since such checkage, claimant has been paid only three-fourths the pay of a lieutenant.

IV. The claimant claims pay as a lieutenant-commander from June 29th, 1906, to this date. The pay of that rank in the case of an officer of more than twenty years' service in the Navy was, from June 29, 1906, to May 12, 1908, at the rate of three thousand five hundred dollars ($3,500) a year, and from May 13, 1908, to the present time four thousand dollars ($4,000) a year, seventy-five (75) per cent of which would be from June 29, 1906, to May 12, 1908, two thousand six hundred and twenty-five dollars ($2,625), and from May 13, 1908, to the present time three thousand dollars ($3,000).

4 The claimant claims pay at that rate less the amounts already paid him as a lieutenant from June 29, 1906, to date, the difference amounting to the sum of about four thousand dollars ($4,000), which amount he claims.

V. This claim is founded upon the action of the President and

Senate in advancing claimant to the grade of lieutenant-commander, and upon the following statutes:

Revised Statutes, § 1556, fixing the rates of pay for officers of the Navy.

Revised Statutes, §1588, relative to the pay of officers upon the retired list.

Act of March 3, 1899, §13, 30 Stat. L. 1007, and Revised Statutes, §§ 1261, 1262, 1263 and 1274.

Act of June 10, 1902, 32 Stat. L. 1444, for the relief of claimant.

Act of June 29, 1906, 34 Stat. L. 554, relative to advance in grade upon the retired list.

Act of May 13, 1908, 35 Stat. L. 127, establishing a new pay table for the Navy.

No assignment or transfer of this claim, or of any part thereof or interest therein, has been made; and the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States. And the claimant claims four thousand dollars ($4,000).

KING & KING,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

George A. King, being duly sworn, deposes and says: I am one of the attorneys for the claimant in this case. I have
5 read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

GEORGE A. KING.

Subscribed and sworn to before me this 25th day of March, 1911.

[SEAL.] MARIE A. SEARLES,
Notary Public.

6 II. *General Traverse.*

Filed March 30, 1911.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

III. *Argument and Submission.*

This case was argued by Mr. George A. King for the claimant, and by Mr. Frederick De Courcy Faust for the defendant, on the 30th day of March, 1911, and submitted.

7 IV. *Findings of Fact and Conclusion of Law.*

This case having been heard by the Court of Claims, the court, upon the evidence makes the following

Findings of Fact.

I.

Jerome E. Morse entered the naval service of the United States as a midshipman on October 13, 1862, and has served continuously therein since that date. During the Civil War he served with credit otherwise than as a cadet prior to April 9, 1865.

While claimant was serving as a lieutenant in the Navy, the Secretary of the Navy, under date of July 22, 1874, addressed a letter to him advising him that he had been transferred to the retired list of officers of the Navy from that date. This letter is correctly quoted in the petition. Since July 22, 1874, the claimant has been borne on the retired list of the Navy.

Under date of June 17, 1878, the claimant was advised by the Secretary of the Navy that, by and with the advice and consent of the Senate, he had been transferred from the furlough to the retired pay list of the Navy on June 14, 1878, and that he was thenceforth to receive 50 per centum of the highest sea pay of his grade.

On June 10, 1902, under the provisions of an act of Congress approved that date (32 Stat. L., 1444), the claimant was transferred from the half-pay list to the 75 per cent pay list of retired officers of the Navy.

On January 17, 1907, the claimant was nominated to the Senate for advancement to the grade of lieutenant commander on the retired list of the Navy, in accordance with the provisions of an act of Congress approved June 29, 1906. His nomination was confirmed by the Senate on January 23, 1907, and on February 2, 1907, the claimant was advised by the Secretary of the Navy that he had been so advanced from June 29, 1906, the date of the passage of the act.

Such a letter is the usual mode of notifying an officer of his advance in grade on the retired list, no new commission being issued in such cases.

II.

On the 30th of April, 1907, the Comptroller of the Treasury rendered an advance decision on the application of a pay officer of the Navy that the claimant was not entitled to 75 per cent of the pay of a lieutenant commander, as a retired officer under section 1588 of the Revised Statutes, but only 75 per cent of that of a lieutenant.

8 Afterwards the claimant applied to the Auditor for the Navy Department for the difference between 75 per cent pay of a lieutenant and of a lieutenant commander. The auditor disallowed the claim. The claimant appealed to the Comptroller of

the Treasury, who decided in his favor September 20, 1907, as shown in volume 14 of the Comptroller's Decisions, page 161.

The claimant was thereupon paid from June 29, 1906, as a lieutenant commander.

Still later, on the 29th of March, 1909, the comptroller, upon his own motion, reopened and reconsidered the decision last made by him and disallowed the amount thereby allowed, as shown in volume 15 of the Comptroller's Decisions, page 584.

Thereupon the difference in pay between that of a lieutenant commander and a lieutenant, as allowed to him by the previous action of the comptroller, was checked against and deducted from his subsequent accruing pay.

III.

(1) If claimant were entitled to receive 75 per cent of the sea pay of a lieutenant commander of more than 20 years' service, he would be paid as follows:

Pay June 29, 1906, to May 12, 1908, 1 year 10 months and 14 days, at $2,625 per annum, three-fourths pay of lieutenant commander after 20 years	$4,914.55
Pay May 13, 1908, to March 25, 1911, 2 years 10 months and 13 days, at $3,000 per annum, being three-fourths pay of lieutenant commander after 20 years	8,608.33
	13,522.88
Less pay received during same period	9,568.00
Balance due	3,954.88

(2) If claimant were entitled to longevity increase, as of over 10 years' service calculated on current yearly pay under the Tyler decision (105 U. S., 244, 246), he would be paid as follows:

Pay June 29, 1906, to May 12, 1908, 1 year 10 months and 14 days, at $2,250 per annum, being three-fourths of $3,000, pay of lieutenant commander after 10 years' service	$4,212.50
Pay from May 13, 1908, to March 25, 1911, 2 years 10 months and 13 days, at $2,722.50, being three-fourths of $3,630, pay of lieutenant commander with longevity increase based on "current yearly pay" as after 10 years' service	7,811.98
	12,024.48
Less pay received during same period	9,568.00
Balance due	2,456.48

(3) If claimant were entitled to two longevity increases, calculated only on grade pay of lieutenant commander, he would be paid as follows:

Pay June 29, 1906, to May 12, 1908, 1 year 10 months and 14 days, at $2,250, being three-fourths of $3,000 per annum, pay of lieutenant commander after 10 years' service	$4,212.50
Pay May 13, 1908, to March 25, 1911, 2 years 10 months and 13 days, at $2,700 per annum, being three-fourths of $3,600, pay of lieutenant commander after 10 years' service	7,747.50
	11,960.00
Less pay received during same period	9,568.00
Balance due	2,392.00

9 *Conclusion of Law.*

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is not entitled to recover and his petition is dismissed.

Opinion.

ATKINSON, *J.*, delivered the opinion of the court.

The claimant, a retired naval officer, brings this suit to recover the difference in pay between that of a lieutenant and a lieutenant-commander on the retired list from June 29, 1906, to the time of the filing of his petition in this cause. The facts upon which he bases his claim are, briefly stated, as follows: While serving as a lieutenant on the U. S. S. Omaha, in March, 1874, his eyesight was pronounced by a medical survey board to be of such a character as to unfit him for active service, and he was detached from his ship in the harbor of Callao, Peru, and sent to the United States. In July of that year he was examined by a naval retiring board at Washington, D. C., convened in accordance with section 23 of the act of August 3, 1861 (12 Stats., 291), now sections 1448 to 1454 and section 1457 of the Revised Statutes, which board rendered the following decision:

"There being no further evidence to offer in the case, the board was cleared for deliberation, and after mature deliberation find that Lieut. Jerome E. Morse, United States Navy, is incapacitated from performing the duties of his office; and the board further finds that the incapacity did not originate in the line of duty, and recommend that Lieut. Morse be placed upon the retired list on furlough pay."

Thereafter, on July 24, 1874, the Secretary of the Navy addressed the following letter to the claimant:

"The naval retiring board, before which you recently appeared, found you incapacitated for performing the duties of your office and that the incapacity did not originate in the line of duty, and the

President of the United States, concurring in opinion with the board, has directed that you be retired on furlough pay. You will accordingly be considered as so retired from this date."

On July 17, 1878, he was transferred by the President, by and with the consent of the Senate, under the provisions of section 1594 of the Revised Statutes, from the furlough to the retired pay list, and thereafter received 50 per cent of the highest sea pay of his grade.

Under date of June 26, 1902, claimant was informed that he had been transferred from the half-pay list to the 75 per centum pay list under the special act of Congress approved June 10, 1902 (32 Stats., 1444), which act is in the language following:

"That the Secretary of the Navy be, and he is hereby, authorized and empowered to transfer Lieutenant Jerome E. Morse, of the retired list of the United States Navy, from the half-pay list to the seventy-five per centum pay list of the retired officers, under section fifteen hundred and eighty-eight of the Revised Statutes of the United States; and the said transfer shall take effect as of the passage of this act."

Section 1588 of the Revised Statutes reads:

"The pay of all officers of the Navy who have been retired after forty-five years' service after reaching the age of sixteen years, or who have been or may be retired after forty years' service, upon their own application to the President, or on attaining the age of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the sea pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement."

The act of June 29, 1906 (34 Stats., 554), provides that any officer of the Navy, not above the rank of captain, who had served honorably in the Civil War prior to April 9, 1865, and who had been "retired on account of wounds or disability incident to the service," may, in the discretion of the President, by and with the consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement. Under the provisions of this act claimant was advanced by the President, with the consent of the Senate, on February 2, 1907, to the rank of lieutenant-commander on the retired list, it being the next grade above that from which he was originally retired in July, 1874.

It is conceded that claimant has all the qualifications for advancement to the grade of lieutenant-commander under the act of June 29, 1906 (supra), if he is to be considered as having been retired for disability incident to the service; but his right of recovery in this action depends solely upon the inquiry whether the special act of June 10, 1902 (supra), operated to change his status from that of

an officer retired for incapacity not incident to the service to that of an officer retired for incapacity incident to the service.

It is true that the special act authorized the transfer of claimant from the half-pay list to the 75 per cent pay-list, but it must be borne in mind that such transfer (as provided by the special act) is to be made "under section 1588 of the Revised Statutes," which section provides that the increase of salary is restricted, as we have already shown, to such officers only as were retired after 45 years of service, or who have attained the age of 62 years, or "on account of incapacity resulting from long and faithful service, or from wounds received in the line of duty, or from sickness or exposure therein." Claimant does not come within any of these conditions. On the contrary, he was retired from active service, when comparatively a young man, because of a disease of his eyes which the retiring board found did not originate in the line of duty. No suggestion is anywhere contained in the record, nor was it raised at bar, that the proceedings of said board were irregular in any particular whatever. Its findings, therefore, upon the question of the fact of the origin of claimant's incapacity, when approved by the President, was the judgment of the tribunal created under the law for the government of the Navy to determine such questions. (Potts v. United States, 125 U. S., 173; Burchard v. United States, ibid., 176.) When, therefore, the Congress afterwards authorized his transfer by the special act of June 10, 1902, from the half-pay list to the 75 per cent pay list, it did not thereby reverse the findings of the retiring board or change the claimant's status as a retired officer.

11 The status of claimant was fixed by the findings of the retiring board, approved by the President, and whether the Congress possesses authority to change the finding of a retiring board, it, however, certainly cannot be held to have expressed an intention to that effect in this case.

We are of the opinion, therefore, and so decide, that claimant is not entitled to be placed on the retired list of the Navy with the rank and retired pay of one grade higher than that actually held by him at the time of his retirement from the naval service in 1874, viz., that of lieutenant, and his petition is accordingly dismissed.

12 V. *Final Judgment.*

At a Court of Claims held in the City of Washington, D. C., on the 10th day of April, 1911, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendant and do order, adjudge and decree that the petition of the said Jerome E. Morse be, and the same is hereby dismissed.

BY THE COURT.

VI. *Claimant's Application for and Allowance of Appeal.*

From the Judgment rendered in this court on the 10th day of April, 1911, dismissing the petition, the claimant, Jerome E. Morse,

by his attorneys of record, hereby makes application for and gives notice of an appeal to the Supreme Court of the United States.

KING & KING,
Attorneys for Claimant.

Filed April 18, 1911.

Ordered: That the above appeal be allowed as prayed for.
April 20, 1911.

BY THE COURT.

13 In the Court of Claims.

30554.

JEROME E. MORSE
v.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the Court of the judgment of the Court dismissing the petition of the claimant Jerome E. Morse, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 29″ day of April, 1911.

[Seal Court of Claims.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 22,644. Court of Claims. Term No. 274. Jerome E. Morse, appellant, vs. The United States. Filed May 1st, 1911. File No. 22,644.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

JEROME E. MORSE, APPELLANT,
v.
THE UNITED STATES.
No. 274.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from the judgment of the Court of Claims dismissing the petition of Jerome E. Morse, an officer on the retired list of the Navy, for the difference between the retired pay of a lieutenant and a lieutenant commander from the date of the passage of the act of June 29, 1906 (34 Stats., 554), to the date of filing his petition, March 25, 1911. The material facts upon which the claim is based are, in substance, as follows:

The appellant entered the naval service as a midshipman in October, 1862, and served continuously therein until July 22, 1874, when he was retired on furlough pay under section 1454, Revised Statutes, quoted in appellant's brief, page 2, upon approval by

the President of the finding of a retiring board that he was incapacitated for active duty, and that his incapacity did not originate in the line of duty. On the 17th of June, 1878, the appellant was transferred by the President, with the advice and consent of the Senate, from the furlough pay to the retired pay list, and thereafter received 50 per cent of the highest sea pay of his grade, under section 1594, Revised Statutes, quoted in appellant's brief, page 2.

An act "for the relief of Lieut. Jerome E. Morse," approved June 10, 1902 (32 Stats., 1444), provides:

> That the Secretary of the Navy be, and he is hereby, authorized and empowered to transfer Lieutenant Jerome E. Morse, of the retired list of the United States Navy, from the half-pay list to the seventy-five per centum pay list of retired officers, under section fifteen hundred and eighty-eight of the Revised Statutes of the United States; and the said transfer shall take effect as of the passage of this act.

The appellant was transferred in accordance with the terms of this statute.

Section 1588, Revised Statutes, referred to in the act last quoted, reads:

> The pay of all officers of the Navy who have been retired after forty-five years' service after reaching the age of sixteen years, or who have been or may be retired after forty years' service, upon their own application to the President, or on attaining the age of sixty-two years, or on account of incapacity result-

> ing from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the sea pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement.

The act of June 29, 1906 (34 Stats., 554), quoted in appellant's brief, page 4, provides that any officer of the Navy not above the rank of captain who served with credit in the Civil War prior to April 9, 1865, otherwise than as a cadet and who had been—

> retired on account of wounds or disability incident to the service or on account of age or after forty years' service may, in the discretion of the President, by and with the consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement: *Provided*, That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the Navy and placed on the retired list by virtue of the provisions of a special act of Congress.

Under the provisions of this act appellant, on February 2, 1907, was advanced by the President, with the consent of the Senate, to the rank of lieutenant

commander on the retired list from June 29, 1906, the date of the passage of the act, being the next grade above that from which he was originally retired.

In an advanced opinion dated April 30, 1907, the Comptroller of the Treasury decided that the claimant's advancement to the next higher grade on the retired list was not authorized by the act of June 29, 1906, *supra*, and that he was not therefore entitled to 75 per cent of the pay of a lieutenant commander as a retired officer under section 1588 of the Revised Statutes, but only to 75 per cent of that of a lieutenant.

Subsequently the comptroller reversed his decision and held that the claimant was entitled both to the rank and the increased pay under the act in question, whereupon he was paid from June 29, 1906, as a lieutenant commander.

On March 13, 1909, the Attorney General, in response to the request of the Secretary of the Navy, rendered an opinion (27 Op. Atty. Gen., p. 221) affirming the views expressed by the Judge Advocate General of the Navy January 25, 1909, in the strictly analogous case of Jabez Burchard, an assistant engineer in the Navy (retired), in which t was held that a private act in substantially identical terms with the act at bar, did not have the effect to change the officer's status from that of one retired for incapacity not incident to his service to that of an officer retired for an incapacity of service origin, and that Mr. Burchard was not therefore eligible under the act of June 29, 1906, *supra*, to be

advanced on the retired list, with the rank and retired pay of one grade above that actually held by him at the time of his retirement. Thereafter, on March 29, 1909, the comptroller, upon his own motion, reopened the decision last made by him, adopted the Attorney General's opinion as the proper construction of the law and the rule to be followed in similar cases, and disallowed the amount of the increased pay awarded the claimant under the decision of September 20, 1907.

The views of the Judge Advocate General of the Navy and the opinion of the Attorney General are printed as an appendix to this brief (post, p. 11) for convenient reference.

The Court of Claims held in an opinion by Atkinson, J. (46 C. Cls., 361), that the appellant was not entitled to the pay of the higher grade on the retired list under the act of June 29, 1906, *supra*, since he was not "retired on account of wounds or disability incident to the service," and dismissed the petition, whereupon the appellant perfected this appeal.

ARGUMENT.

I.

The act of June 10, 1902, supra, transferred appellant from the half-pay list to the 75 per cent pay list of retired officers, but did not operate to change his status as an officer retired for incapacity not originating in the line of duty.

Since it is not disputed that when Lieut. Morse was retired, in July, 1874, it was for incapacity *not* incident to the service, and since it is conceded that

he possesses all the other qualifications for advancement to the next higher grade on the retired list prescribed by the act of June 29, 1906, *supra*, the solution of this case turns upon the single question:

Did the private act of June 10, 1902, *supra*, operate to change appellant's status on the retired list so that he is now to be considered as having been retired "on account of wounds or disability incident to the service"?

This question is foreclosed by the decisions of this court in the cases of *Potts* v. *United States* (125 U. S., 176) and *United States* v. *Burchard* (125 U. S., 179).

In the *Potts* case this court, in discussing the question whether the transfer of an officer from the furlough to the retired pay list, under section 1594, Revised Statutes, operated to change the cause of retirement, said:

> It may have been intended as a provision for a remedy for wrongs done by the retiring boards, but it limited the power of the President and Senate in that behalf to a transfer of the name of the officer from "the furlough to the retired pay list." The cause of his retirement still remains the same.

Appellant insists, however, that the action of Congress in authorizing his transfer to the 75 per cent pay list was an expression of its judgment twenty-eight years after the event, that the finding of the retiring board, which the President approved, was erroneous, and that his incapacity really resulted from sickness or exposure in the line of duty.

This court rejected a similar contention urged in behalf of the appellant in the *Potts* case last cited in the following language:

> The finding of the retiring board, approved by the President, is the judgment of the tribunal created under the law for the government of the Navy to determine such questions, that Potts be retired from active service for incapacity, which "did not originate in the line of duty." * * * When he was afterwards transferred by the action of the President and Senate "from the furlough to the retired pay list" his status as a retired officer was not changed. He still remained an officer retired for incapacity which did not originate in the line of duty, but his pay was raised from that of an officer retired "on furlough pay" to that of one retired on half sea pay.

By adroit reference to statements contained in an opinion of the comptroller, printed as an appendix to appellant's brief, pages 18–35, an attempt is made to establish a conflict of opinion as between a board of medical survey, in accordance with whose recommendation appellant was originally detached from his ship, and the finding of the retiring board upon which he was retired, as affording a basis for the argument that by the act of 1902 Congress intended to correct a mistake originally made in the cause of appellant's retirement.

The status of Lieut. Morse was fixed, however, by the findings of the retiring board when approved by the President, and it is at least a doubtful question

whether Congress has the authority to change the finding of a retiring board, even if it so intended. As this court said in *Burchard* v. *United States* (125 U. S., 176):

> Neither the department nor the President could then change the findings, as they had already been approved and were no longer open to review.
>
> The action of the President was equivalent to the judgment of an appropriate tribunal upon the facts as found. That judgment as a judgment could not be disturbed.

It is doubtless in deference to this language that appellant concedes in his brief (top of p. 8) that "It must, of course, be admitted that the finding of the retiring board on that point, when approved by the President, was controlling."

See also *Johnson* v. *Sayre* (158 U. S., 109); *Mullen* v. *United States* (212 U. S., 516); *Reaves* v. *Ainsworth* (219 U. S., 296); *United States* v. *Mason* (227 U. S.).

It is undoubtedly within the power of Congress to give Lieut. Morse all the benefits which he would have received had he been retired in the manner and for the cause for which appellant now contends. And Congress has taken definite action in his behalf by authorizing his transfer "from the half-pay list to the 75 per cent pay list of retired officers, under section 1588 of the Revised Statutes of the United States." (Act of June 10, 1902, *supra.*)

But the language of this act manifestly does not attempt to change the *cause* for which appellant was

retired, and thereby make him an officer of the Navy who had heretofore been "retired on account of wounds or disability incident to the service," contrary to the finding of the retiring board, "the tribunal created under the law for the government of the Navy to determine such questions."

II.

Appellant not entitled to longevity increase of pay while on the retired list.

The court will reach this question only in the event that it sustains appellant's first proposition and decides that he is entitled to be advanced to the rank of lieutenant commander. Even in that event we insist that his claim for longevity pay under either of the two alternative methods submitted (appellant's brief, pp. 13–16) is wholly without merit. The longevity claim is from 1906, the date upon which the advancement of appellant to the grade of lieutenant commander was attempted, and the claim is based upon the law pertaining to the Army, which, it is contended, was adopted as the standard for the Navy by the assimilating clause of section 13 of the Navy personnel act of March 3, 1899 (30 Stats., 1007), which provides:

> That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army.

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The answer to this portion of the claim is twofold:

First. It is directly opposed to the last proviso to the same section, which expressly declares "that nothing in this act shall operate to increase or reduce the pay of any officer now on the retired list of the Navy."

Second. The Army law, upon which the assimilation is based, was modified by the act of March 2, 1903 (32 Stats., 932), quoted, bottom page 14, appellant's brief, and made applicable only to cases of "officers retired on account of wounds received in battle."

There is not and never has been any statute authorizing the allowance of longevity increases to officers of the Navy while on the retired list. (*Thornley* v. *United States*, 113 U. S., 310; *Rutherford* v. *United States*, 18 C. Cls., 339.)

The decision of the comptroller of May 12, 1899, upon which appellant relies (5 Comp., 811) was overruled in terms in 15 Comptroller, 767.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims is correct and that it should be affirmed.

FREDERICK DE C. FAUST,
Acting Assistant Attorney General.

APPENDIX.

NAVY DEPARTMENT,
OFFICE OF JUDGE ADVOCATE GENERAL,
Washington, January 25, 1909.

MEMORANDUM.—Regarding right of Jabez Burchard, assistant engineer, U. S. N., to advancement on the retired list, under the act of June 29, 1906, on account of Civil War service.

Jabez Burchard was appointed an acting third assistant engineer March 14, 1865; was honorably discharged January 9, 1868; reentered the service September 1, 1870, as second assistant engineer; was promoted to assistant engineer on February 24, 1874; and on October 26, 1874, was retired on furlough pay in pursuance of the findings of a retiring board "that Assistant Engineer Jabez Burchard is incapacitated from active service" and "that the incapacity did not originate in the line of duty."

On March 1, 1877, the Secretary of the Navy addressed a letter to the auditor, stating that—

> Upon a full review of all the facts in the case * * * the department is of opinion that the causes which incapacitated him (Burchard) for active duty were incident to the service and that he should have the higher rates of pay allowed retired officers by section 1588 of the Revised Statutes.

On April 1, 1878, Burchard was transferred by the President, with the consent of the Senate, from the furlough to the fifty per cent retired pay list, under authority of section 1594, Revised Statutes.

He has now been transferred from the half pay list to the seventy-five per centum pay list of retired officers, in pursuance of an act of Congress approved January 5, 1909, "to take effect from the date of his retirement."

The Bureau of Navigation asks whether Burchard should be given the rank and three-fourths the pay of the next higher grade, because of Civil War service, under the act of June 29, 1906; and if so, from what date he should be given the advancement—the date of the passage of the act of January 5, 1909, or from June 29, 1906.

Burchard had twenty-six days' service prior to April 9, 1865, and there is nothing of record to show that it was other than creditable service; he is consequently entitled to advancement, provided all the other requirements of the act of June 29, 1906, are fulfilled. One of these requirements is that he shall have been retired "on account of wounds or disability incident to the service."

There is no question that when Burchard was retired on October 26, 1874, it was on account of incapacity *not* the result of an incident of the service.

Further, in view of the fact that it has been decided by the department that he was erroneously retired, there can be no question that Burchard is equitably entitled to the benefits which he would have obtained had he been correctly retired on October 26, 1874, one of which benefits would be advancement on the retired list to the next higher grade, from June 29, 1906.

The only question is whether the President has authority, under the law, to nominate Burchard for advancement under this act of June 29, 1906, which requires that an officer so nominated shall have been retired for incapacity resulting from an incident of the service.

A similar case was that of Jerome E. Morse, who was transferred from the fifty per centum retired pay list to the seventy-five per centum list, in pursuance of a special act of Congress approved June 10, 1902. After the passage of the act of June 29, 1906, Morse was given the rank of the next higher grade, upon nomination of the President and approval of the Senate. On April 30, 1907, in a decision to Pay Inspector F. T. Arms, United States Navy, the Comptroller of the Treasury held that, notwithstanding the action of the President and the Senate, Morse was not in fact retired for disability incident to the service and could not, therefore, be given the retired pay of the next higher grade. Later, September 20, 1907 (14 Comp. Dec., 168), the comptroller, after consideration of the contentions of counsel for Morse, reversed his previous decision and held that Morse was entitled to the retired pay of the next higher grade to which he had been advanced by the President and Senate.

Notwithstanding the precedent established by the Morse case, I am of opinion that Jabez Burchard can not legally be given the rank and retired pay of the next higher grade, without further special legislation in his behalf. The act of January 5, 1909, expressly authorizes the transfer of Burchard from the half pay list to the seventy-five per centum pay list; by it his rate of pay is increased to such as it would have been had he been retired "after forty-five years' service after reaching the age of sixteen years, or * * * after forty years' service, upon his own application to the President, or on attaining the age of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein." The act for his

relief, however, says nothing about giving Burchard the rank and retired pay of the next higher grade.

In the case of *Potts* v. *United States* (125 U. S., 173), the Supreme Court, in discussing the question whether the transfer of an officer from the furlough to the retired pay list, under section 1594 of the Revised Statutes, operated to change the cause of his retirement, says: "*It may have been intended as a provision for a remedy for wrongs done by the retiring boards, but it limited the power of the President and Senate in that behalf to a transfer of the name of the officer from 'the furlough to the retired pay list.' The cause of his retirement still remains the same.*"

In order to hold that Burchard is entitled to the benefits of the act of June 29, 1906, it will be necessary to hold that Congress, by its act of January 5, 1909, for his relief, changed Burchard's record of retirement and made him an officer retired for disability incident to the service.

This raises the very important question, which does not appear to have been considered by the Comptroller of the Treasury in the Morse case, whether or not Congress has the authority to change the finding of the retiring board in this case, even if it so intended.

In the case of *Potts* v. *United States* (cited above) the court said: "The finding of the retiring board, approved by the President, is the judgment of the tribunal created under the law for the government of the Navy to determine such questions, that Potts be retired from active service for incapacity, which 'did not originate in the line of duty.' * * * When he was afterwards transferred by the action of the President and Senate 'from the furlough to the retired pay list' his *status* as a retired officer was not changed. *He still remained an officer retired for inca-*

pacity which did not originate in the line of duty, but his pay was raised from that of an officer retired 'on furlough pay' to that of one retired on half sea pay."

In *Burchard* v. *United States* (125 U. S., 176) the Supreme Court said:

> Neither the department nor the President could then change the findings, as they had already been approved and were no longer open to review.
>
> *The action of the President was equivalent to the judgment of an appropriate tribunal upon the facts as found. That judgment as a judgment could not be disturbed.*

It has thus been held by the Supreme Court that the action of the President in approving the finding of a retiring board is a judicial act "equivalent to the judgment of an appropriate tribunal." This being so, it is not within the constitutional power of the legislative branch of the Government, even by express enactment, to alter that "judgment *as a judgment*," or correct any errors therein. (For authorities upon this general question, see Cooley, Const. Lim., ch. 5.) It is undoubtedly within the power of Congress to give Burchard all the benefits which he would have received had he been correctly retired—to transfer him from the half-pay list to the seventy-five per centum pay list, and to give him the rank and retired pay of the next higher grade on account of Civil War service, but it is not within the power of Congress to alter the facts in the case and to declare that Burchard was retired for disability incident to the service, contrary to the finding of the retiring board, "the tribunal created under the law for the government of the Navy to determine such questions." Congress has provided for transferring Burchard to the seventy-five per centum pay list, but has said nothing about

advancing him to the next higher grade, which advancement, under the act of June 29, 1906, is conditional upon the *fact* that the officer to be so advanced "has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service."

I am therefore of opinion—

(1) That although this act for Burchard's relief, in the language of the Supreme Court, "may have been intended as a provision for a remedy for wrongs done by the retiring boards * * * it limited the power of the President and Senate in that behalf to a transfer of the name of the officer" from the half-pay list to the seventy-five per centum pay list of retired officers, and that it is not within the power of the President and Senate to advance Burchard on the retired list under the act of June 29, 1906, unless the benefits of that act are expressly extended to his case by Congress.

(2) That, even granting this law should be construed liberally in order to effectuate the intention of Congress, and that it was the intention of Congress to correct Burchard's record of retirement, nevertheless the department can not counsel his advancement under the act of June 29, 1906, because the legislative branch of the Government has not the power, under the Constitution, to change the finding of the retiring board, *as a finding*, in this case.

Respectfully submitted.

E. H. CAMPBELL,
Judge Advocate General.

OPINION OF THE ATTORNEY GENERAL.

DEPARTMENT OF JUSTICE,
March 13, 1909.

SIR: I have the honor to respond to your request of February 13, 1909, for an opinion upon the case there stated, in substance as follows:

Jabez Burchard, assistant engineer, United States Navy, served some time as third assistant engineer in the Civil War; was afterwards promoted to assistant engineer and was retired on furlough pay October 26, 1874, under section 1454, Revised Statutes, upon the approval by the President of the finding of the retiring board that he was incapacitated for active duty, and that the incapacity did not originate in the line of duty.

March 1, 1877, the Secretary of the Navy, in a letter to the Auditor for the Navy Department, stated that—

> Upon a full review of all the facts in the case * * * the department is of opinion that the causes which incapacitated him (Burchard) for active duty were incident to the service; and that he should have the higher rates of pay allowed retired officers by section 1588 of the Revised Statutes.

April 1, 1878, Mr. Burchard was transferred by the President, by and with the advice and consent of the Senate, from the furlough pay to the 50 per centum retired-pay list, under authority of section 1594 of the Revised Statutes.

An act "for the relief of Jabez Burchard," approved January 5, 1909 (35 Stat., 1399), provides:

> That the Secretary of the Navy be, and he is hereby, authorized and directed to transfer Jabez Burchard, assistant engineer, United States Navy (retired), from the half-pay list to the seventy-five per centum pay list of retired officers under section fifteen hundred and eighty-eight of the Revised Statutes of the United States, to take effect from the date of his retirement.

The transfer directed by this statute has been made.

Section 1588 of the Revised Statutes, referred to in the act just quoted, reads:

> The pay of all officers of the Navy who have been retired after forty-five years' service after reaching the age of sixteen years, or who have been or may be retired after forty years' service, upon their own application to the President, or on attaining the age of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the sea pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement.

Assistant Engineer Burchard now requests that he be given the rank and retired pay of the next higher grade, pursuant to the act of June 29, 1906 (34 Stat., 554), which provides:

That any officer of the Navy not above the grade of captain who served with credit as an officer or as an enlisted man in the Regular or Volunteer forces during the Civil War prior to April ninth, eighteen hundred and sixty-five, otherwise than as a cadet, and whose name is borne on the Official Register of the Navy, and who has heretofore been or may hereafter be retired on account of wounds or disability incident to the service, or on account of age, or after forty years' service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement: *Provided*, That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the Navy and placed on the retired list by virtue of the provisions of a special act of Congress.

The officer has all the qualifications for advancement under said act if, under the facts stated, and especially the above private act for his relief, he is to be now considered as having been retired for incapacity from causes incident to the service, and this is substantially your question.

In the case of Jerome E. Morse (14 Comp. Dec., 167), a case similar to this, the Comptroller of the Treasury, in a reconsidered opinion, held that a private act similar to this operates to change the *status* of the officer from that of one retired for incapacity not incident to his service to that of one retired for an incapacity of service origin, and that if the officer has the other qualifications this entitled him to advancement under the act of June 29, 1906.

I can not, however, concur in that decision, and I agree with the opinion of the learned Judge Advocate General of the Navy, dated January 25, 1909, submitted with the papers presented to me. The act of January 5, 1909, authorizes the transfer of Burchard from the half-pay list to the 75 per centum pay list. By it his rate of pay is increased to as much as it would have been if he had been retired—

> after forty-five years' service after reaching the age of sixteen years, or * * * after forty years' service upon their own application to the President, or on attaining the age of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein. (Sec. 1588, R. S.)

This act does not, however, give Mr. Burchard the rank and retired pay of the next higher grade, as was stated in the case of *Potts* v. *United States* (125 U. S., 176):

> The object of the statute is not to enable the President and Senate to vacate the finding of the retiring board that the incapacity of the officer did not "originate in the line of duty," and to decide that it was "the result of an incident of the service," but to afford a means for his relief from the consequences of such a finding, to the extent of adding to his pay the difference between the half of leave-of-absence pay and the half of sea pay. It may have been intended as a provision for a remedy for wrongs done by retiring boards, but it limited the power of the President and Senate in that behalf to a transfer of the name of the officer from "the furlough to the retired pay list." The cause of his retirement still remains the same and determines his position on the "retired-pay list."

The status of Mr. Burchard was fixed by the findings of the retiring board, approved by the President, and it may be questioned whether or not Congress has the authority to change the finding of the retiring board, even if it so intended.

In *United States* v. *Burchard* (125 U. S., 179) the Supreme Court said:

> Neither the department nor the President could then change the findings, as they had already been approved, and were no longer open to review. The action of the President was equivalent to the judgment of an appropriate tribunal upon the facts as found. That judgment as a judgment could not be disturbed.

It is undoubtedly within the power of Congress to give Mr. Burchard all the benefits which he would have received had he been correctly retired, and Congress has taken definite action in his behalf by authorizing the Secretary of the Navy to transfer him—

> from the half-pay list to the seventy-five per centum list of retired officers under section fifteen hundred and eighty-eight of the Revised Statutes of the United States, to take effect from the date of his retirement. (Private, No. 63, approved Jan. 5, 1909; 35 Stat., 1399.)

This act gave him all the benefits of persons who by the terms of that section were entitled to the emoluments prescribed therein, but it did not make him an officer of the Navy who had heretofore been "retired on account of wounds or disabilities incident to the service, * * *," the fact being, as the record shows, that, although unadvisedly or erroneously, Mr. Burchard was definitely retired for a

physical disability which was not due to an incident of the service.

In my opinion, therefore, Mr. Burchard is not eligible under the act of June 29, 1906, above stated, to be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of his retirement.

I return the papers submitted with your communication of February 13, 1909.

Very respectfully, yours,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

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TABLE OF CASES.

Page

Brown v. *United States*, 113 U. S. 568 12

Comptroller's Decisions:

Vol. 5, p. 811 15

Vol. 14, p. 161 18

Vol. 15, p. 584 35

James v. *United States*, 202 U. S. 401 11

McLean v. *United States*, 226 U. S. 374 10

Morse v. *United States*, 46 C. Cls. 361 6

Opinions of Attorney-General:

Vol. 17, p. 76 12

Plummer v. *United States*, 224 U. S. 137 13

United States v. *Tyler*, 105 U. S. 244 14

Wood v. *United States*, 107 U. S. 414 11

Supreme Court of the United States.

October Term, 1912.

JEROME E. MORSE, *Appellant*,
v.
THE UNITED STATES. } No. 274.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

I. Statement of the Case.

This is a suit by Jerome E. Morse, an officer on the retired list of the Navy, to recover the difference between the retired pay of a lieutenant and that of a lieutenant-commander from June 29, 1906, to March 25, 1911.

The principal question in the case is which of these two ranks the appellant held on the retired list from June 29, 1906. The facts upon which this question depends are shown by the findings of fact, etc., as follows:

"Jerome E. Morse entered the naval service of the United States as a midshipman on October 13, 1862, and has served continuously therein since that date. During the Civil War he served with credit otherwise than as a cadet prior to April 9, 1865.

"While claimant was serving as a lieutenant in the Navy, the Secretary of the Navy, under date of July 22, 1874, addressed a letter to him advising him that he had been transferred to the retired list of officers of the Navy from that date." (Finding I, record, p. 4.)

This letter (quoted in the petition, record, p. 1) states that the retiring board found him incapacitated for performing the duties of his office, and that the incapacity did not originate in the line of duty, and that the President concurring in the opinion of the board has directed that he be retired on furlough pay. Since July 22, 1874, he has been borne on the retired list of the Navy.

The Revised Statutes provided at that date as follows:

"Sec. 1453. When a retiring-board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the President, be retired from active service with retired pay, as allowed by Chapter Eight of this Title."

"Sec. 1454. When said board finds that an officer is incapacitated for active service and that his incapacity is not the result of any incident of the service, such officer shall, if said decision is approved by the President, be retired from active service on furlough-pay, or wholly retired from service with one year's pay, as the President may determine."

"Sec. 1457. Officers retired from active service shall be placed on the retired list of officers of the grades to which they belonged respectively at the time of their retirement, and continue to be borne on the Navy Register. They shall be entitled to wear the uniform of their respective grades, and shall be subject to the rules and articles for the government of the Navy and to trial by general court-martial. The names of officers wholly retired from the service shall be omitted from the Navy Register."

"Sec. 1588. The pay of all officers of the Navy who have been retired after forty-five years' service after reaching the age of sixteen years, or who have been or may be retired after forty years' service, upon their own application to the President, or on attaining the age of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure

therein, shall, when not on active duty, be equal to seventy-five per centum of the sea-pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the sea-pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement."

"Sec. 1593. Officers placed on the retired list, on furlough pay, shall receive only one-half of the pay to which they would have been entitled if on leave of absence on the active list."

"Sec. 1594. The President, by and with the advice and consent of the Senate, may transfer any officer on the retired list from the furlough to the retired-pay list."

Under date of June 17, 1878, the claimant was advised by the Secretary of the Navy that, by and with the advice and consent of the Senate, he had been transferred from the furlough to the retired pay list of the Navy on June 14, 1878, and that he was thenceforth to receive 50 per cent of the highest sea pay of his grade (Finding I, record, p. 4).

June 10, 1902, Congress passed the following act (32 Stat. L. 1444; quoted in the petition, record, p. 1):

"*Be it enacted*, etc., That the Secretary of the Navy be, and he is hereby, authorized and empowered to transfer Lieutenant Jerome E. Morse, of the retired list of the United States Navy, from the half-pay list to the seventy-five per centum pay list of retired officers, under section 1588 of the Revised Statutes of the United States; and the said transfer shall take effect as of the passage of this Act."

On the day of this act the claimant was transferred from the half-pay list to the 75 per cent pay list of retired officers of the Navy (Finding I, record, p. 4).

June 29, 1906, Congress enacted the following provision (34 Stat. L. 554):

"That any officer of the Navy not above the grade of captain who served with credit as an officer or as an enlisted man in the regular or volunteer forces during the civil war prior to April 9th, 1865, otherwise than as a cadet, and whose name is borne on the official register of the Navy, and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service or on account of age or after forty years' service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement: *Provided*, That this Act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the Navy and placed on the retired list by virtue of the provisions of a special Act of Congress."

Acting under this statute, the President, January 17, 1907, nominated "Lieut. Jerome E. Morse, United States Navy, retired, to be a lieutenant-commander on the retired list of the Navy, from the 29th day of June, 1906, in accordance with a provision in the Naval Appropriation Act approved on that date." His nomination was confirmed in the same terms by the Senate on January 23, 1907 (Cong. Rec. 59th Cong. 2d Sess. part 2; nomination, p. 1344; confirmation, p. 1558).

February 2, 1907, he was advised by the Secretary of the Navy that he had been so advanced from June 29, 1906, the date of the passage of the act. Such a letter is the usual mode of notifying an officer of his advance in grade on the retired list, no new commission being issued in such cases (Finding I, record, p. 4).

On the 30th of April, 1907, the Comptroller of the Treasury rendered an advance decision as required by act of July 31st, 1894, next to last paragraph of Sec. 8 (28 Stat. L. 208), on the application of a pay officer of

the Navy that the claimant was not entitled to 75 per cent of the pay of a lieutenant-commander, as a retired officer under Sec. 1588 of the Revised Statutes, but only to 75 per cent of that of a lieutenant.

Afterwards the claimant applied to the Auditor for the Navy Department for the difference between 75 per cent pay of a lieutenant and of a lieutenant-commander. The Auditor disallowed the claim. The claimant appealed to the Comptroller of the Treasury, who decided in his favor September 20, 1907, as shown in Vol. 14 of the Comptroller's Decisions, page 161.

The claimant was thereupon paid from June 29, 1906, as a lieutenant-commander.

Still later, on the 29th of March, 1909, the Comptroller, upon his own motion, reopened and reconsidered the decision last made by him and disallowed the amount thereby allowed, as shown in volume 15 of the Comptroller's Decisions, page 584.

Thereupon the difference in pay between that of a lieutenant-commander and a lieutenant, as allowed to him by the previous action of the Comptroller, was checked against and deducted from his subsequently accruing pay (Finding II, record, pp. 4, 5). From June 29, 1906, he has therefore received the pay only of a lieutenant in the Navy.

These decisions of the Comptroller throw so much light on the question involved that they are annexed to this brief as Appendix A and Appendix B, respectively.

An examination of the published annual official Navy Register discloses that the Register of January 1st, 1908, contains the name of the appellant on pp. 152, 153, among the list of lieutenant-commanders on the retired list. In the column "Retired" the date is given as "22 July '74," and under the heading, "Date attained present rank," the date is given as "29 June '06."

The Register for the next year, January 1st, 1909, contains his name pp. 160, 161, in identical terms.

The official Register of the next year, January 1, 1910, p. 134, puts him back into the list of lieutenants, where he had been previous to 1908. The entry in the column, "Date attained present rank," p. 135, is "22 Mar. '71."

His name has since remained in the same position on the Navy Register (1911, pp. 138, 139; 1912, pp. 144, 145).

The Court of Claims held in an opinion by Judge Atkinson (record, pp. 6–8) that the appellant was not entitled to the rank of lieutenant-commander on the retired list, but only to that of lieutenant. The case is reported 46 C. Cls. 361. His petition was therefore dismissed, and he appealed.

II. Assignment of Error.

The appellant hereby assigns the following as error in the opinion and judgment of the Court of Claims:

That said court gave no effect to the action of the President and Senate in placing the appellant on the retired list of the Navy with the rank of lieutenant-commander, from June 29, 1906, and gave judgment dismissing his petition.

Whereas, said court should have held that the claimant upon nomination by the President, confirmation by the Senate, and notification by the Secretary of the Navy of such nomination and confirmation as lieutenant-commander became a lieutenant-commander on the retired list from June 29, 1906, and should have given judgment in his favor for the pay of that rank.

III. Brief of Argument.

Promotion to Lieutenant-Commander Regular.

The able decision of the Comptroller of the Treasury first made on this claim September 20, 1907, Appendix A to this brief (*post*, pp. 18–35) gave full effect to the action of the President and Senate in placing the appellant upon the retired list with the grade of lieutenant-commander under the act of June 29, 1906. That action was based upon the theory that the act of 1902 transferring the officer from the 50 per cent to the 75 per cent retired list under Sec. 1588 of the Revised Statutes, was passed for the purpose of correcting a mistake which had been made in originally placing him on the retired list as an officer retired for incapacity not originating in line of duty.

It appears at the opening of the Comptroller's decision (*post*, pp. 18–23) that there was a conflict in the reports of the boards which considered the officer's case preliminary to his retirement.

The Board of Medical Survey upon whose report he was detached from the vessel upon which he was serving reported (*post*, p. 23) that it "is of the opinion that his disease originated in the service, and in the line of duty." The medical members of the retiring board reported to the president of that board (*post*, pp. 20, 21) that they "find him affected with nearsightedness which permanently incapacitates him from performing the duties appropriate to his commission. We have no further information than the statements made in the accompanying copy of a report of Medical Survey," etc., just quoted.

Notwithstanding these apparently favorable statements, the retiring-board made a finding (*post*, pp. 19, 20) "that the incapacity did not originate in the line of duty," etc. These statements show that there was a conflict of opinion as to the cause of the officer's incapacity.

It must, of course, be admitted that the finding of the retiring board on that point when approved by the President was controlling. Congress was, however, competent to correct any mistake that it may have thought was made in placing him upon the retired list in that way, and exercised that power by the special act of 1902.

The Comptroller in his opinion quotes the report of the House Committee on Naval Affairs which was adopted by the Senate Committee on Naval Affairs upon the bill for appellant's relief which became the act of 1902. The committee in that report as quoted by the Comptroller (*post*, p. 25) says:

"He claims that under the act of March 3, 1873, he is entitled to go on the 75 per cent list, because he was retired on account of sickness and exposure in the line of duty, and the committee are of opinion that his claim is well established."

Such must have been the view taken by the President when he nominated the officer under the act of 1906 to be a lieutenant-commander, and the Senate when it confirmed him for that rank.

The conclusion reached by the Comptroller in 1907 is well supported by his reasoning (*post*, pp. 33, 34). The name of the appellant appears on the Navy Register for the years 1908 and 1909 as a lieutenant-commander retired as of June 29, 1906.

Later, in 1909, the Comptroller, entirely in deference to an opinion of the Attorney-General in another case, revoked his previous decision of 1907, and held the advancement of the claimant to the grade of lieutenant-commander unwarranted and void.

Since that time he has been paid only as a lieutenant and is borne upon the Navy Registers for 1910, 1911, and 1912 only in that rank. Thus an officer recognized by the President, Senate and Secretary of the Navy, as

belonging to a certain grade on the retired list, is demoted from that grade purely by fiat of the Comptroller of the Treasury.

There is no warrant for an inferior executive officer to undertake to revise and reverse the action of the President and Senate, advancing an officer on the retired list. The executive authorities of the United States can not properly question the judgment of the President and Senate jointly construing an act of Congress, especially when that act is conclusively shown by the reports of the committees on whose recommendations it was passed, to be intended to bear the exact sense thus attributed to it.

The Comptroller upon an independent examination of this case reached the conclusion here contended for. His subsequent reexamination and disallowance was merely in deference to the opinion of the Attorney-General in another case. That other case is not shown to be analogous. But even if it were, it would constitute no authority for overruling the construction placed by the President and the Senate upon an act of Congress.

Act 1902 Corrected an Injustice.

The Act of 1902 (quoted in petition, record, p. 1 and *ante*, p. 3) transferred the appellant "from the half pay list to the seventy-five per centum pay list" of retired officers under Sec. 1588 of the Revised Statutes of the United States. This action of Congress was not a mere arbitrary gift of the difference between fifty and seventy-five per cent pay. The reference to Sec. 1588 of the Revised Statutes (quoted, *ante*, pp. 2, 3) expressed the judgment of Congress that his incapacity was of the class described in that section as entitling an officer to seventy-five per cent pay as "incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty or from sickness or exposure therein."

Like the special relief act construed by this court in *McLean* v. *United States*, 226 U. S. 374, it was intended to correct an injustice done to an officer, and should be construed in that spirit. The House Committee on Naval Affairs reported on the bill which became the act of 1902:

"He claims that under the act of March 3, 1873, he is entitled to go on the seventy-five per cent list because he was retired on account of sickness and exposure in the line of duty, and the Committee are of opinion that his claim is well established."

This report was adopted by the Senate Committee on Naval Affairs as its own (House Report 318; Senate Report No. 1749, 57th Cong. 1st Sess.).

This brings the case directly within the language of the court by Mr. Justice McKenna in the *McLean* case (226 U. S. 380, 381):

"She asserts that the prompting of the act was to repair an injustice done to Major McLean, and, to support the assertion, she refers to the report of the committee of the House of Representatives and that of the Senate, Fifty-third Congress. The reference is justified (*Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 333; *Northern Pacific Co.* v. *Washington*, 222 U. S. 370, 380) and gives support to the contention that the circumstances which preceded and provoked Major McLean's resignation appealed to Congress, and to redress its consequences Congress authorized his reinstatement, and, to make it complete, passed the act of February 24, 1905.

"It certainly may be assumed that the act was not a simple gratuity. Public moneys are not appropriated as mere gifts. They are appropriated in recognition and reward of merit or in recompense for service, or, as it may be inferred in the present case, reparation for injustice done. Keeping this in mind, the extent of the relief granted to appellant may be determined."

When, therefore, Congress in 1902, upon the reports of its committees that the claim of this officer that his incapacity originated in the service was well founded, enacted that he should be transferred to the list of officers retired for such a cause under Sec. 1588 of the Revised Statutes, that enactment made it mandatory upon all officers of the Government thereafter to treat him as retired for such an incapacity.

In *Wood* v. *United States*, 107 U. S. 414, it was decided that the rank and position of officers on the retired list is at all times within the control of Congress. This control Congress exercised by the passage of the act of 1902, transferring the claimant from the list of officers retired from causes not incident to the service to the list of those retired from a cause originating in the service. This it had power to do. Indeed, it is fully within the power of Congress to make a retroactive increase in the salary of an officer and this, too, even after he has gone out of office (*James* v. *United States*, 202 U. S. 401). This, however, is beyond what Congress undertook to do in the present case. The act of 1902 was prospective only. Full effect should be given to it from its date.

Action of the President and Senate.

The fact that the President by nominating, and the Senate by confirming him, to the higher grade shortly after the passage of the act of June 29, 1906, treated him as being within the intent and meaning of that act (*ante*, p. 4) an officer "retired on account of wounds or disability incident to the service," is strongly persuasive that he was an officer so retired, if it is not absolutely conclusive.

A similar question was decided by the Attorney-General in 1881 in favor of the conclusiveness of the action of the President. The syllabus of the decision is as follows, 17 Opinions, 76:

"Where, under the provisions of section 1506, Revised Statutes, an officer was advanced by the President in numbers, with the advice and consent of the Senate, for eminent and conspicuous conduct in battle or extraordinary heroism: *Held*, that such action of the President and Senate is conclusive upon the executive department of the Government, and that the grounds thereof are not subject to re-examination."

In the text it is said, pp. 76, 77:

"A rational interpretation of the section I have quoted is, that Congress has left to the discretion of the President the determination of what acts of heroism should be recommended to the Senate for reward, and, in providing that the Senate must advise and consent to the advancement, has indicated the only forum which may inquire into the wisdom with which that discretion has been exercised. The nomination for the advancement of 1879 is regular and in due form, as are also the resolution of the Senate and the commission. The advancement being an accomplished fact, and within the terms of section 1506, in my opinion it is not in your power to inquire what was the act of heroism, or where and when it was committed, which induced your predecessor and the Senate, in 1879, to advance Paymaster Stevenson fifteen numbers.

"I am of the opinion that their action in that matter is conclusive upon the executive department, and that, therefore, it is not subject to your re-examination or revision."

In *Brown* v. *United States*, 113 U. S. 568, the question was whether boatswains were included in the provisions of law for the retirement of "any officer of the Navy." This court said, p. 570:

"It must be conceded that were the question a new one, the true construction of the section would be open to doubt."

But, in view of the fact that the President had treated boatswains as entitled to retirement the court accepted that determination as conclusive.

The judgment of the President and Senate, as expressed by the nomination and confirmation of the claimant to be a lieutenant-commander, under the act of June 29, 1906, ought not to be questioned.

Computation of Longevity Pay.

The Court of Claims makes a finding (III, record, pp. 5, 6), stating three alternative methods of computing the amount that the appellant is entitled to recover, if entitled at all. As the second of these alternatives (foot of p. 5 of record) is based upon a mode of computing longevity pay which this court has rejected in *Plummer* v. *United States*, 224 U. S. 137, 143–145, it may be eliminated from consideration.

The difference between the alternatives stated in Par. 1 of Finding III (middle of p. 5) and Par. 3 (top of p. 6) is, briefly stated, whether the officer is entitled to be paid as of over twenty years' service or only ten years' service.

If he is entitled to receive 75 per cent of the sea pay of a lieutenant-commander of more than twenty years' service, he is entitled to a judgment for $3,954.88 (Finding III, Paragraph 1, record, p. 5). If he is entitled to only two longevity increases as an officer of only ten years' service, the balance due him would be only $2,392 (Finding II, Paragraph 3, record, p. 6).

He entered the service October 13, 1862, and was retired July 22, 1874 (Finding I, p. 4). He was therefore of more than ten but less than fifteen years' service at the time of his retirement. In 1906 he received by the nomination of the President and confirmation of the

Senate the rank of lieutenant-commander. If all the years from the date of his entry into the service are to be taken into account, he is of more than twenty years' service, and should be paid as such.

Longevity increase for officers of the Navy in 1906 at the time the appellant became a lieutenant-commander was governed by the law pertaining to the Army, the pay of which was adopted as the standard for the Navy by the 13th section of the Personnel Act of March 3, 1899 (30 Stat. L. 1007).

The army statutes provide as follows:

"SEC. 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service." (Amended June 30, 1882, 22 Stat. L. 118, to provide that the increase "shall be computed on the yearly pay of the grade.")

"SEC. 1263. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law."

In *United States* v. *Tyler*, 105 U. S. 244, this court held (p. 246):

"That the increased pay of ten per cent for each five years' service applies to the years so passed in the service after retirement as well as before."

Officers of the Army continued to be so paid until March 2, 1903, when Congress provided (32 Stat. 932):

"That hereafter, except in case of officers retired on account of wounds received in battle, no officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid

any further increase of longevity pay above that which had accrued at date of their retirement."

The law regulating longevity increase since May 13, 1908, to officers of the Navy is that contained in the act of that date (35 Stat. L. 128):

"There shall be allowed and paid to each commissioned officer below the rank of rear-admiral ten per centum of his current yearly pay for each term of five years service in the Army, Navy, and Marine Corps. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law: *Provided*, That the annual pay of captain shall not exceed $5,000 per annum; of commander, $4,500 per annum, and of lieutenant-commander, $4,000 per annum."

It thus appears that up to 1903, all service in the Army whether on the active or retired list was considered in the computation of longevity pay. As the appellant in this case had long prior to that date reached his maximum of twenty years, it follows that he is entitled to be paid on the retired list as an officer of more than twenty years' service.

This mode of computation of longevity pay is in accordance with the decisions of the Comptroller of the Treasury in other cases under the general law. That officer in a decision rendered within three months after the passage of the Personnel Act, May 12, 1899, said (5 Comp. Dec. 811):

"The Supreme Court held, in the case of *United States* v. *Tyler* (105 U. S. 244), that retired officers in the Army were entitled to such increase, because the law granting the same applied to all commissioned officers of the Army, which included retired officers. The same court, however, held in the case of *Thornley* v. *United States*

(113 U. S. 310), that retired Navy officers were not entitled to such increase for the reason that the statutes limited increased pay for length of service in the Navy to officers on the active list and made no provision for such increase to officers retired. It would follow from the principle of these decisions that, as section 13 of the Navy personnel act provides for Army pay to all commissioned officers of the line and Medical and Pay Corps, officers retired on Army pay under the act are entitled to longevity pay as retired officers in the same manner as retired Army officers, and I so decide."

Still later, in 1903, the Comptroller decided in the case of a retired officer placed on active duty that he was entitled to count the entire time of his service, both on the active and retired lists toward longevity in computing his pay. He said (Memoranda of Bureau of Supplies and Accounts, first series, pp. 248, 249):

"It is well established that a Naval officer is entitled to count the time while he was a naval cadet for the purpose of computing his pay (5 Comp. Dec. 22); and that a retired officer of the Navy who is detailed for active duty is entitled to count the time during which he has been retired in determining his rate of pay while so detailed (4 Comp. Dec. 615; 15 MS. 75).

"Upon the facts stated I am of the opinion that the said officer is entitled to count the time which he was a naval cadet and the time during which he was retired in making up the period from which to determine his present rate of pay, which is that of an Ensign on shore duty after twenty years' service, or at the rate of $1,666 per annum."

The judgment should therefore be for the amount stated in the first alternative of Finding III, p. 5; that is, $3,954.88.

Conclusion.

The judgment of the Court of Claims should be reversed and the cause remanded to that court with directions to render judgment in favor of the appellant for his retired pay as lieutenant-commander from June 29, 1906.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellant.

APPENDIX A.
(14 Comptroller's Decisions, 161.)

PAY OF OFFICER OF NAVY RETIRED FOR INCAPACITY NOT INCURRED IN LINE OF DUTY AND ADVANCED IN RANK UNDER ACT OF JUNE 29, 1906.

Where an officer of the Navy was retired on furlough pay because of incapacity *not* originating in the line of duty, and was afterwards, by action of the President and Senate, transferred from the furlough to the retired pay list, and was subsequently transferred by the Secretary of the Navy "from the half-pay list to the seventy-five per cent pay list of retired officers under section fifteen hundred and eighty-eight of the Revised Statutes" under and by authority of a special act of Congress passed for the relief of such officer and authorizing such transfer and providing that it "shall take effect as of the passage of this act," such officer thereby became an officer retired on account of disability originating in the line of duty from the date of the passage of said act, and, being otherwise qualified within the act of June 29, 1906, possessed the qualifications which enabled the President and Senate, under the said act of June 29, 1906, to advance him in rank and pay on the retired list one grade above that actually held by him at the time of retirement, and is entitled to the pay of such higher grade from June 29, 1906.

(*Decision by Acting Comptroller Mitchell, September 20, 1907.*)

Jerome E. Morse, retired as a lieutenant, United States Navy, appealed July 24, 1907, from the action of the Auditor for the Navy Department in settlement dated July 19, 1907, disallowing his claim for pay under the act of June 29, 1906 (34 Stat., 554), which provides:

"That any officer of the Navy not above the grade of captain who served with credit as an officer or as an enlisted man in the regular or volunteer forces during the civil war prior to April ninth, eighteen hundred and sixty-five, otherwise than as a cadet, and whose name is

borne on the Official Register of the Navy, and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service or on account of age or after forty years' service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement: *Provided*, That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the Navy and placed on the retired list by virtue of the provisions of a special act of Congress."

The auditor disallowed the claim because—

"A navy officer who was not retired for any of the reasons mentioned in the act of June 29, 1906, is not entitled to increase of retired pay under such act. (Comp. Dec., April 30, 1907.)"

It appears that claimant entered the Naval Academy October 11, 1862; rendered active military duty on practice cruises against the enemy during the civil war as midshipman; that being physically disabled he was in July, 1874, examined by a naval retiring board, authorized by section 23 of the act of August 3, 1861 (12 Stat., 291), now sections 1448, 1449, 1450, 1452, 1453, 1454 and 1457 of the Revised Statutes, who reported that he was incapacitated from performing the duties of his office and that the incapacity did not originate in the line of duty, and in said report the board recommended that claimant be placed upon the retired list on furlough pay. The President, in July, 1874, concurred in said report and directed that claimant be retired on furlough pay.

The said retiring board convened at Washington, July 2, 1874. Its proceedings and findings were as follows:

"The president of the board then addressed a letter to the medical members, requesting them to make a careful examination into the past and present physical condition of Lieutenant Morse, and report the result in writing.

"The medical members of the board and Lieutenant Morse thereupon retired, when, after examination being

made into that officer's physical condition, submitted a written report in the case, which was read and is hereto annexed and marked B.

"An opportunity was then afforded Lieutenant Morse to submit a statement of his case in writing, which that officer accordingly did; and it being duly sworn to, was read and is hereto appended and marked C.

"Report of medical survey held on board the U. S. steamer *Omaha* in the bay of Callao under date of March 30, 1874, furnished from the office of the Bureau of Medicine and Surgery, and an authenticated copy of which is hereto annexed and marked D, was read.

"There being no further evidence to offer in the case, the board was cleared for deliberation; and after mature deliberation find that Lieutenant Jerome E. Morse, U. S. Navy, is incapacitated from performing the duties of his office; and the board further find that the incapacity did not originate in the line of duty, and recommend that Lieutenant Morse be placed upon the retired list on furlough pay.

"J. W. A. NICHOLSON,
"*Commodore and President.*
"JNO. C. FEBIGER,
"*Captain.*
"J. BLAKELY CREIGHTON,
"*Captain.*
"JOHN Y. TAYLOR,
"*Medical Inspector.*
"DAVID KINDLEBERGER,
"*Surgeon.*
"JAMES C. DULIN,
"*Recorder.*"

Exhibit B, being the report of the medical members of the retiring board to Commodore J. W. A. Nicholson, president of said retiring board, is as follows:

"We have examined Lieutenant Jerome E. Morse, U. S. Navy, and find him affected with nearsightedness, which permanently incapacitates him from performing the duties appropriate to his commission. We have no further information bearing upon this case than the

statements made in the accompanying copy of a report of medical survey held upon him on board the U. S. S. *Omaha*, at Callao, Peru, March 30, 1874.

"Very respectfully,

"JOHN Y. TAYLOR,

"*Medical Inspector.*

"DAVID KINDLEBERGER,

"*Surgeon.*"

Exhibit C, referred to in the report of the retiring board, is a statement prepared by the claimant himself and submitted to the retiring board. It reads as follows:

"GENTLEMEN OF THE RETIRING BOARD: I have the honor to state to you that I entered the U. S. Naval Academy in October, 1862, and graduated in 1866, at which time my eyesight was perfectly clear. January 1, 1867, I joined the U. S. S. *Pawnee* and sailed for Brazil soon after. I served in the South Atlantic Squadron about forty months, the last fourteen months of which I was on board the U. S. S. *Wasp* at Montevideo and up the rivers Paraguay and Parana. During the fall of 1869 I had quite a bad attack of intermittent fever of a malarious character (the latter part of my time on the *Wasp*).

"Since that time I have been subjected to serve neuralgic pains in the side of the head.

"It was soon after my return from the South Atlantic Station that I began to feel a little inconvenience from nearsightedness.

"This was the spring of 1870.

"In July, 1870, I was ordered to the U. S. S. *Dictator* (monitor) at Key West, Fla.

"I served until June, 1871, on the latter vessel, all the time at Key West; and after leaving that vessel I found that my eyesight was very much worse.

"The rooms on board were very dark, and in order to read or write in one of them it was necessary to burn a candle, even in the daytime.

"From June, 1871, to August, 1872, I was on leave and on shore duty at New York Navy Yard. During this time I noticed only a gradual shortening of the eyesight.

"In August, 1872, I reported for duty on board the U. S. S. *Omaha* and went to the south Pacific, where I served until sent home by a medical board of survey in April, 1874.

"During the year and a half that I was on board the *Omaha* I felt that my eyesight grew rapidly worse until at last I was forced to wear my glasses at all times in order to see with any amount of distinctness.

"I will also add that there are no cases of nearsightedness in my family, and that I as a young man always had very good eyesight and never any trouble with my eyes.

"Very respectfully, your obdt. servt.,

"JEROME E. MORSE, U. S. N."

The report of the medical survey held on board the U. S. steamer *Omaha* March 30, 1874, referred to as Exhibit D and read before the retiring board, is as follows:

"U. S. STEAMER OMAHA, 2D RATE,

"*Bay of Callao, Peru, March 30, 1874.*

"To Rear-Admiral JOHN J. ALMY, U. S. N.,

"*Comd'g U. S. Naval Force, South Pacific Station.*

"SIR: In obedience to your order of the 26th instant, we have held a careful survey on Lieutenant Jerome E. Morse, U. S. Navy, attached to the U. S. steamer *Omaha*, native of Leominster, Mass., aged 28 years and 1 month, entered the Navy at Newport, R. I., on the 11th of October, 1862, and beg leave to report as follows:

"1. Present condition: Unfit for service; can read Snellens No. 3 test type at 13 inches, No. 8 at 15½, and No. 30 at 36 inches. The acuteness of vision is the same in both eyes; the patient is, as proved by the above tests, very short-sighted, and the disease is progressive.

"2. Disease: Shortsightedness, progressive in character.

"3. Probable future duration: The disease is permanent and likely to increase in degree.

"4. Recommendation: We recommend that he be detached and sent to the United States.

"5. Origin: Lieutenant Morse states that when he was admitted to the service in 1862 his eyesight was normal.

He first noticed shortsightedness in his case when attached to the U. S. S. *Pawnee*, South Atlantic Station, in 1867, and the disease has been gradually increasing, but the progress has been greatest during the last year, so that in every port he is obliged to buy stronger glasses. He further states that he is unable to refer the origin of his disease to any particular service or special circumstance attending his naval career, but believes that it originated from the ordinary performance of duty afloat during the last seven years. The board of medical survey accept Lieutenant Morse's statement as evidence and is of the opinion that his disease originated in the service and in the line of duty; we know that he is subject to severe attacks of facial neuralgia of malarial origin from exposure to climatic influence on duty 'in the harbor of Montevideo in 1869,' and it is possible that his shortsightedness had its origin in an attack of intermittent fever of which he suffered at that time; it certainly had its beginning at that time.

"Very respectfully,

"JOHN C. SPEAR,
"*Surgeon, U. S. N.*
"P. FITZSIMONS,
"*Asst. Surg., U. S. N.*
"REMUS C. PERSONS,
"*Asst. Surgeon, U. S. N.*

"Approved Mar. 21, 1874.
"JOHN J. ALMY,
"*Rear-Admiral U. S. Naval Force,*
"*South-Pacific Station.*"

On said report there is the following indorsement:

"I would respectfully suggest that Lieutenant Morse be examined by the medical retiring board at Washington with a view of having him placed on the retired list.

"JOHN J. ALMY,
"*Rear-Admiral U. S. N.,*
"*Comd'g U. S Naval Forces, South Pacific Station.*"

On July 23, 1874, the Secretary of the Navy notified the claimant as follows:

"The naval retiring board, before which you recently appeared, found you incapacitated for performing the duties of your office and that the incapacity did not originate in the line of duty, and the President of the United States, concurring in opinion with the board, has directed that you be retired on furlough pay. You will accordingly be considered as so retired from this date."

Claimant has ever since been carried on the register of the navy as having been retired on account of disability not incurred in the line of duty.

On June 17, 1878, the Secretary of the Navy informed the claimant that by and with the advice and consent of the Senate he had been transferred from the furlough to the retired pay list and was to receive 50 per centum of the highest sea pay of his grade.

The act of June 10, 1902 (32 Stat., 1444), entitled "An act for the relief of Lieut. Jerome E. Morse," provides:

"That the Secretary of the Navy be, and he is hereby, authorized and empowered to transfer Lieutenant Jerome E. Morse, of the retired list of the United States Navy, from the half-pay list to the seventy-five per centum pay list of retired officers, under section fifteen hundred and eighty-eight of the Revised Statutes of the United States; and the said transfer shall take effect as of the passage of this act."

The Committee on Naval Affairs of the House of Representatives, having in charge the bill which became the act above quoted, reported as follows (H. R. 318) February 1, 1902:

"The Committee on Naval Affairs, to whom was referred the bill (H. R. 720) for the relief of Jerome E. Morse, lieutenant, United States Navy, (retired), beg leave to submit the following report and recommend that said bill do pass without amendment.

"This is a bill enacting that the Secretary of the Navy be authorized to transfer Lieut. Jerome E. Morse, United States Navy, from the 50 to the 75 per cent pay list of retired officers, under section 1588 of the Revised Statutes of the United States.

"Bills similar to this passed the Senate during the

Fifty-first and Fifty-second Congresses, but were not acted upon in the House, and bills were favorably reported to the Senate in the Fifty-third and Fifty-fourth Congresses, and to the House of Representatives in the Fifty-sixth Congress, but not acted upon.

"By an act of Congress, passed in 1878, Lieutenant Morse was transferred from the furlough pay list to the half pay list. He claims that under the act of March 3, 1873, he is entitled to go on the 75 per cent list, because he was retired on account of sickness and exposure in the line of duty, and the committee are of opinion that his claim is well established." * * *

By Senate Report No. 1749, June 4, 1902, the Naval Committee of the Senate adopted the House Report, and recommended the passage of said act.

Section 1588 of the Revised Statutes provides:

"The pay of all officers of the Navy who have been retired after forty-five years' service after reaching the age of sixteen years, or who have been or may be retired after forty years' service, upon their own application to the President, or on attaining the age of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the sea pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement."

On January 18, 1907, the President nominated the claimant for advancement on the retired list under the act of June 29, 1906, *supra*, and on January 23, 1907, the Senate consented thereto and on February 2, 1907, claimant was officially notified by the Secretary of the Navy of his advancement under said act.

On April 30, 1907, upon the application of Pay Inspector F. T. Arms, U. S. Navy, this office rendered an advance decision to the effect that claimant was not retired

for any of the causes mentioned in the act of June 29, 1906, entitling an officer to advancement on the retired list, and that he was not entitled to increased pay under it. Thereupon the claimant filed this claim with the Auditor for the Navy Department, which was by him disallowed, as already stated, and from said disallowance he now appeals.

Counsel for claimant contends:

1. That whether claimant was possessed of the qualifications necessary to entitle him to advancement under the act of June 29, 1906, is not now an open question for the accounting officers or any Executive Department of the Government.

That the President and the Senate are by said act the sole judges whether officers borne on the retired list of the Navy are possessed of the qualifications necessary for their advancement, and that the President and Senate having decided that the claimant possessed the requisite qualifications, and having given effect to such decision by the President nominating him for said advancement and the Senate consenting thereto, such joint action by the President and Senate is conclusive upon the accounting officers when the claimant presents his claim to them for increased pay on account of said advancement.

The act of June 29, 1906, *supra*, has left to the discretion of the President the determination of what officers of the navy possessing the qualifications prescribed by said act he will advance by and with the consent of the Senate, and in the exercise of such discretion neither the accounting officers nor the courts have power to inquire into or question; but, on the other hand, if the President, by and with the advice and consent of the Senate, should advance an officer under the provisions of said act and it should afterwards be established that the officer did not possess the qualifications necessary to entitle him to such advancement, then such advancement would be without authority of law, and in such a case I do not think such an advancement, which is not a judicial but an executive act, would be conclusive upon the accounting officers.

Section 236 of the Revised Statutes provides:

"All claims and demands whatever by the United

States or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the departments of the Treasury."

The examination of accounts and the settlement and adjustment of claims and demands devolving upon the accounting officers require the weighing of evidence, the construction of statutes, and the application of the general principles of the law.

Section 8, act of July 31, 1894 (28 Stat., 207), provides:

"The balances which may from time to time be certified by the auditors to the Division of Bookkeeping and Warrants, or to the Postmaster-General, upon the settlement of public accounts, shall be final and conclusive upon the executive branch of the Government, except that any person whose accounts may have been settled, the head of the executive department, * * * to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the executive branch of the Government. * * *

"Disbursing officers, or the head of any executive department, * * * may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement."

I have examined the authorities (17 Opin. Att. Gen. 76; *Butterworth* v. *United States*, 112 U. S. 50) cited by counsel for claimant, but I do not think they have any application to the question here presented.

2. Counsel for claimant contends that although claimant was retired in 1874 by the retiring board and the President because of incapacity which did not originate in the line of duty, yet the special act of June 10, 1902, by which the Secretary of the Navy was authorized and empowered to transfer Lieutenant Morse of the retired list to the 75 per centum pay list of retired officers under

section 1588 of the Revised Statutes, the said transfer to take effect as of the passage of the act, read in the light of the report of the Naval Committee, *supra*, the claimant was thereafter in the status of an officer retired on account of a disability originating in the line of duty. That said report was before Congress and the said Morse was asking for the passage of said special act upon the ground that the disability for which he was retired originated in the service, and that there was nothing else before Congress to influence it to pass said special act.

That the only question before Congress when it passed said special act was whether or not the disability for which claimant was retired originated in the service and was in fact one of the causes for retirement under section 1588.

That by said special act the Secretary of the Navy was authorized and empowered to transfer claimant from a list of officers retired not because of disabilities originating in the service to the list of officers retired for disabilities originating in the service, and that when this was done the claimant was then in the status of an officer retired for a disability originating in the service, and that he possessed the qualifications which entitled him to advancement in the discretion of the President and the Senate under the provisions of the act of June 29, 1906. Much stress is placed upon the words of said special act "from the half-pay list to the seventy-five per cent pay list of retired officers, *under section 1588* of the Revised Statutes of the United States." It is contended that these words can have no other meaning than that Congress considered that the disability for which claimant was retired originated in the service.

That there is nothing in the record to justify said special act save the one and sole thing that in the opinion of Congress a mistake had been made by the retiring board and the President in 1874 in retiring the claimant because of an incapacity which did not originate in the service, and that Congress considered and believed the claimant's statement and the report of the medical survey held on board the U. S. S. *Omaha*, March 30, 1874, *supra*, to the effect that claimant's disability for which he

was retired did in fact originate in the service, and that solely because of this fact said special act was passed, and that the purpose of said act was to place claimant in the class of retired officers embraced in the 75 per centum list under section 1588, and that thereafter he should be entitled to all the rights, present and future, which belonged to or might be conferred upon the other members of such class.

Unless the claimant was retired "on account of wounds or disability incident to the service or on account of age or after forty years' service" he is not entitled to the benefits of the act of June 29, 1906.

In *Potts* v. *United States* (125 U. S. 173) it appeared that Potts, an assistant engineer of the navy, being physically disabled, was examined by a naval retiring board, who reported that he was incapacitated from active service and that in their judgment the incapacity did not originate in the line of duty. In this report the President concurred and directed a retirement on furlough pay.

On March 15, 1877, Potts was nominated by the President and confirmed by the Senate on the 17th of the same month for transfer from the furlough to the retired-pay list under section 1594 of the Revised Statutes.

After his confirmation he was paid only one-half the sea pay of an officer of his rank at the time of retirement, the accounting officers being of opinion that his case fell within the second clause of section 1588, *supra*. The suit was to recover the difference between one-half and three-fourths sea pay from the date of his transfer. The Court of Claims gave judgment against claimant, which on appeal was affirmed.

The Supreme Court, in the course of its decision, said:

"We agree entirely with the Court of Claims in the view it took of this case. The finding of the retiring board, approved by the President, is the judgment of the tribunal created under the law for the government of the navy to determine such questions, that Potts be retired from active service for incapacity which 'did not originate in the line of duty.' This made him a retired officer on furlough pay and gave him one-half the leave-of-absence pay of an officer on the active list.

"When he was afterwards transferred by the action of the President and Senate 'from the furlough to the retired-pay list' his *status* as a retired officer was not changed. He still remained an officer retired for incapacity which did not originate in the line of duty, but his pay was raised from that of an officer retired 'on furlough pay' to that of one retired on half sea pay. In other words, he was taken from the furlough list and put on the list of those retired under circumstances which brought them within the second clause of section 1588 instead of the first.

"The object of the statute is not to enable the President and Senate to vacate the finding of the retiring board that the incapacity of the officer did not 'originate in the line of duty' and to decide that it was 'the result of an incident of the service,' but to afford a means for his relief from the consequences of such finding to the extent of adding to his pay the difference between the half of leave of absence pay and the half of sea pay.

"It may have been intended as a provision for a remedy for wrongs done by the retiring boards, but it limited the power of the President and Senate in that behalf to a transfer of the name of the officer from 'the furlough to the retired-pay list.' The cause of his retirement still remains the same and determines his position on the 'retired-pay list.'"

In *Burchard* v. *United States* and *United States* v. *Burchard* (125 U. S. 176) it appeared that Burchard, an assistant engineer in the navy, was examined by a retiring board under section 1448, *supra*, and the board reported that he was incapacitated from active service and "that his incapacity was not the result of an incident of the service." The President approved the findings, and Burchard was retired on furlough pay October 26, 1874. On March 1, 1877, the Secretary of the Navy addressed a letter to the Fourth Auditor of the Treasury, stating that—

"Upon a full review of all the facts in the case * * * the department is of opinion that the causes which incapacitated him (Burchard) for active duty were incident to the service and that he should have the higher rates of pay allowed retired officers by section 1588 of the Revised Statutes."

On March 1, 1878, the President made the following nomination:

To the Senate of the United States:

"In accordance with sec. 1594 of the Revised Statutes, I nominate Jabez Burchard, assistant engineer, to be transferred from the furlough to the retired-pay list of the navy from the twenty-fifth of October, 1874.

"R. B. HAYES."

On the 25th of March, 1878, the Senate advised and consented to the appointment, as follows:

"*Resolved*, That the Senate advise and consent to the appointment of Assistant Engineer Burchard to be transferred from the furlough to the retired-pay list from the 26th day of October, 1874, agreeably to the nomination."

On April 1, 1878, Burchard was notified of this transfer.

From October 26, 1874, until April 1, 1878, he was paid 75 per centum of the sea pay for the grade or rank which he held at the time of retirement, being $1,275 a year. After April 1, 1878, he was paid $850 a year, under the second clause of section 1588, his half sea pay. The above suit was to recover the difference between one-half and three-quarters of sea pay from April 1, 1878.

The United States set up by way of counter claim that he had been overpaid $1,168.75 for his salary from April 1, 1875, to March 31, 1878, and asked judgment for that amount.

The Supreme Court held that claimant upon his transfer from furlough to the retired list was entitled to only half sea pay under the second clause of section 1588, and that he should refund to the United States whatever of salary that had been paid him in excess of the amount due him at said rate.

In the course of the decision the court said:

"It (sec. 1594) was evidently intended to enable the President, with the advice and consent of the Senate, to relieve a deserving officer to a limited extent from the consequences of the findings of retiring boards. Under such

circumstances it should, in our opinion, be liberally construed in favor of justice. This case may fairly be taken for illustration.

"The law requires a record of the proceedings and decision of the retiring board to be made and transmitted to the Secretary of the Navy, and by him laid before the President for his approval or disapproval or orders in the case. At first the findings in this case were approved and orders made thereon, but afterwards the department became satisfied on reexamination that the findings were wrong and that the incapacity was actually the result of causes incident to the service.

"Neither the department nor the President could then change the findings, as they had already been approved and were no longer open to review.

"The action of the President was equivalent to the judgment of an appropriate tribunal upon the facts as found. That judgment as a judgment could not be disturbed, but under this statement it was just within the power of the President, with the advice and consent of the Senate, to relieve the officer to some extent from its consequences by transferring him from furlough to retired pay." * * *

By section 1588 the law makes provision for two rates of pay to retired navy officers, one being three-quarters of the sea pay of the grade upon which the officer was retired, if retired for one of the specific causes mentioned in said section, and the other being one-half of such pay if retired for any other cause.

There is no question but that in 1874 claimant was retired because of incapacity which did not originate in the line of duty. The finding of the retiring board and the approval by the President in 1874 was the judgment of the tribunal created under the law for the government of the navy to determine such questions, and their judgment was that he should be retired from active service because of incapacity and that such incapacity did not originate in the line of duty. In the Potts and Burchard cases it was held that when an officer was placed on the retired list on furlough pay and was afterwards, under section 1594 of the Revised Statutes, transferred by the ac-

tion of the President and Senate "from the furlough to the retired-pay list," his status as a retired officer was not changed and that he still remained an officer retired for incapacity which did not originate in the line of duty, but that his pay was simply raised from that of an officer retired "on furlough pay" to that of one retired on half sea pay.

The question is by no means free from difficulty and doubt, but I do not think the Potts and Burchard cases are decisive of the question here presented.

What was the situation that called for the special act of June 10, 1902?

On March 30, 1874, the medical survey on board the U. S. S. *Omaha* made an examination and reported that claimant was incapacitated to perform the duties of his office, and that such incapacity originated in the service and in the line of duty.

In July, 1874, a retiring board was convened in Washington, before which claimant appeared and insisted that his incapacity originated in the line of duty, but he was retired from active service because of incapacity not originating in the service.

In 1878, by the action of the President and Senate, he was transferred from the furlough to the retired-pay list, which according to the decisions of the Supreme Court in the Potts and Burchard cases, entitled him only to one-half the sea pay of the grade from which he was retired, when if he had been retired because of incapacity originating in the line of duty he would have been entitled to receive three-fourths the sea pay of the grade from which he was retired.

If a wrong or injustice had heen done him, Congress alone could undo the wrong by legislation.

The title of the act of June 10, 1902, is "An act for the relief of Lieutenant Jerome E. Morse." The title of an act may be used not to add to or take from the body of the statute, but as an aid in interpreting its meaning.

What was the relief that Congress intended to grant the claimant unless it was relief from the consequences of the wrong and injustice that had been done him by the retiring board in 1874? The facts and consideration

which appear to have induced the Committees on Naval Affairs of the House and Senate to recommend the passage of said act, as shown by their reports, was that the disability for which claimant was retired originated in the line of duty.

The claimant had contended before the Committees on Naval Affairs of the House and Senate that the disability for which he was retired originated in the service, and said committees reported to Congress that in their opinion such was the fact, and because of such fact they recommended the passage of said act, which authorized the Secretary of the Navy to transfer the claimant to the 75 per centum pay list under section 1588, a place where he could not be transferred as the law then stood unless the disability for which he was retired originated in the service. The acts of June 10, 1902, and June 29, 1906, should be liberally construed so as to give effect to the intention and object of Congress in passing them, and it should be interpreted not only by its exact words, but also by its apparent general purpose. (*United States* v. *Saunders*, 22 Wall. 492.)

Reading the act of June 10, 1902, in the light of its title, and the reports of the Committees on Naval Affairs of the House and Senate, and considering the language in which it is couched and giving to it the scope which appears Congress intended it should have, I am of opinion and so decide that when the Secretary of the Navy transferred the claimant as provided in said act he became an officer retired for a disability originating in the line of duty from the date of the passage of said act, and that he possessed the qualifications which enabled the President and Senate to advance him under the act of June 29, 1906.

The action of the auditor and my opinion of April 30, 1907, rendered upon an insufficient statement of facts which the Auditor followed, as it was his duty to do, are reversed.

Upon this revision, therefore, claimant will be allowed the difference between the retired pay of a lieutenant and that of a lieutenant-commander of his length of service from June 29, 1906, to April 30, 1907, ten months and

two days, at $37.50 per month, amounting to $377.50, the amount claimed, and a certificate of differences will be issued accordingly.

APPENDIX B.

(15 Comptroller's Decisions, 584.)

ELIGIBILITY OF NAVY OFFICERS RETIRED FOR INCAPACITY NOT INCURRED IN LINE OF DUTY FOR ADVANCEMENT IN RANK AND PAY UNDER ACT OF JUNE 29, 1906.

Where an officer of the Navy was retired on furlough pay because of incapacity not originating in the line of duty and was afterwards, by action of the President and Senate, transferred from the furlough to the retired pay list, and was subsequently transferred by the Secretary of the Navy "from the half-pay list to the seventy-five per cent pay list of retired officers under section 1588 of the Revised Statutes," under and by authority of a special act of Congress passed for the relief of such officer and authorizing such transfer and providing that it "shall take effect as of the passage of this act," such officer did not thereby become an officer retired on account of disability originating in the line of duty from the date of the passage of said act and is not eligible under the act of June 29, 1906, to be placed on the retired list of the navy with the rank and retired pay of one grade above that actually held by him at the time of his retirement.

(*Decision by Assistant Comptroller Mitchell, March 29, 1909.*)

My decision of September 20, 1907 (14 Comp. Dec., 161), in the case of Jerome E. Morse, lieutenant, U. S. Navy, retired, is hereby taken up for reconsideration.

In 1874 Lieutenant Morse was retired on furlough pay on account of disability not incurred in the line of duty. In 1878 he was transferred from the furlough to the 50 per cent retired pay list. He was transferred from the half-pay list to the 75 per cent pay list of retired officers in accordance with the provisions of the act of June 10, 1902 (32 Stat. 1444), which is as follows:

"That the Secretary of the Navy be, and he is hereby, authorized and empowered to transfer Lieutenant Jerome E. Morse, of the retired list of the United States Navy, from the half-pay list to the seventy-five per centum pay list of retired officers, under section 1588 of the Revised Statutes of the United States; and the said transfer shall take effect as of the passage of this act."

He was advanced to the grade of lieutenant-commander under the act of June 29, 1906 (34 Stat. 554), which provides:

"That any officer of the Navy not above the grade of captain who served with credit as an officer or as an enlisted man in the regular or volunteer forces during the civil war prior to April 9th, 1865, otherwise than as a cadet, and whose name is borne on the official register of the navy, and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service or on account of age or after forty years' service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the navy with the rank and retired pay of one grade above that actually held by him at the time of retirement: *Provided*, That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the navy and placed on the retired list by virtue of the provisions of a special act of Congress."

Upon the application of Pay Inspector F. T. Arms, U. S. Navy, I rendered, on April 30, 1907 (41 MS. Comp. Dec. 491), an advance decision to the effect that Lieutenant Morse was not retired for any of the causes mentioned in the said act of June 29, 1906, entitling an officer to advancement on the retired list, and that he was not entitled to increased pay under it.

Lieutenant Morse filed his claim with the Auditor for the Navy Department for the difference between the pay he had received as a lieutenant and that of a lieutenant-commander on the retired list from June 29, 1906, to April 30, 1907, amounting to $377.50, which claim the auditor, following said advance decision of April 30, 1907, disallowed in his settlement of July 19, 1907.

From the disallowance in this settlement the claimant appealed, and by my said decision of September 20, 1907 (14 Comp. Dec. 161), while expressing doubt in regard to the matter, I reversed my said advance decision of April 30, 1907, and held that the said act of June 10, 1902, changed the status of claimant from that of an officer retired for a disability not incurred in the line of duty to that of an officer who was retired for a disability incurred in the line of duty, and that possessing the other qualifications prerequisite for advancement under the said act of June 29, 1906, the claimant was eligible for advancement under that act, and that he was entitled to the pay claimed which was disallowed by the auditor.

The act "for the relief of Jabez Burchard," approved January 5, 1909 (Private, No. 63), is substantially the same as the said act of June 10, 1902, for the relief of Lieutenant Morse.

Mr. Burchard was retired in 1874 as an assistant engineer in the United States Navy on furlough pay on account of disability not incurred in the line of duty, and in 1878 transferred to the 50 per cent retired pay list.

In response to the request of the Secretary of the Navy the Attorney-General, in his opinion dated March 13, 1909, held that the said private act for the relief of Jabez Burchard did not have the effect to change his status from that of an officer retired for disability not incurred in the line of duty to that of an officer retired for disability incurred in the line of duty, and that therefore—

"Mr. Burchard is not eligible under the act of June 29, 1906, above stated, to be placed on the retired list of the navy with the rank and retired pay of one grade above that actually held by him at the time of his retirement."

This opinion is accepted as the proper construction of the law and will be followed in this and similar cases.

The said settlement by the auditor of July 19, 1907, as revised by this office on September 20, 1907 (14 Comp. Dec. 161), as stated above, is therefore reopened, and the amount of $377.50 allowed on that revision is hereby disallowed. (See 4 Comp. Dec. 303; 11 *id.* 459; *Rollins and Presbrey* v. *United States*, 23 C. Cls. 106, 123.)

57TH CONGRESS, 1st Session. } SENATE. { REPORT No. 1749.

JEROME E. MORSE.

JUNE 4, 1902.—Ordered to be printed.

MR. GALLINGER, from the Committee on Naval Affairs, submitted the following

REPORT.

[To accompany H. R. 720.]

The Committee on Naval Affairs, to whom was referred the bill (H. R. 720) for the relief of Lieut. Jerome E. Morse, having considered the same, report thereon with a recommendation that it pass.

The Report of the House Committee on Naval Affairs is herewith appended.

[House Report No. 318, Fifty-seventh Congress, first session.]

The Committee on Naval Affairs, to whom was referred the bill (H. R. 720) for the relief of Jerome E. Morse, lieutenant, United States Navy (retired), beg leave to submit the following report and recommend that said bill do pass without amendment.

This is a bill enacting that the Secretary of the Navy be authorized to transfer Lieut. Jerome E. Morse, United States Navy, from the 50 to the 75 per cent pay list of retired officers under section 1588 of the Revised Statutes of the United States.

Bills similar to this passed the Senate during the Fifty-first and Fifty-second Congresses, but were not acted upon in the House, and bills were favorably reported to the Senate in the Fifty-third and Fifty-fourth Congresses, and to the House of Representatives in the Fifty-sixth Congress, but not acted upon.

By an act of Congress passed in 1878 Lieutenant Morse was transferred from the furlough-pay list to the half-pay list. He claims that under the act of March 3, 1873, he is entitled to go on the 75 per cent list, because he was retired on account of sickness and exposure in the line of duty, and the committee are of opinion that his claim is well established.

The provision of law is as follows:

"*Provided*, That those officers on the retired list, and those hereafter retired, who were, or who may be, retired after forty years' service, or on attaining the age of 62 years, in conformity with section 1 of the act of December, 1861, and its amendments, dated June 25, 1864, or those who were or may be, retired from incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, from sickness or exposure therein, shall, after the passage of this act, be entitled to 75 per centum of the present sea-pay of the grade or rank which they held at the time of their retirement."

Lieutenant Morse's statement of his case is as follows:

"The facts of my case are that when I entered the United States Naval Academy, October 11, 1862, my eyesight was practically perfect, as it was also when I graduated in June, 1866.

"In the fall of 1866 I was ordered to the U. S. S. *Pawnee*, and proceeded to the South Atlantic Station, where I served about forty months in the Tropics, the last year being on the U. S. S. *Wasp*, stationed at Montevideo, Uruguay, and doing service in the malarial-infected districts of the Paraguay and other inland rivers.

"While on that river service in 1869 I contracted a severe case of intermittent malarial fever, and after weeks

of sickness I found my eyesight materially affected, and that it became necessary to use eyeglasses for distinct vision, and in many other ways I have suffered to this day from the effects of that exposure and fever.

"On my return to the United States, after a short interval, I was ordered to the U. S. Monitor *Dictator*, at Key West, Fla. That vessel was moored near the sandy shore, and being without bulwarks, the glare and reflection of the sun from the white sand of the shore and the smooth surface of the bay was at times almost blinding for strong eyes, and in my case this service resulted in impairing my already defective sight, so that when I returned North, after about a year at that port, I found it absolutely necessary to obtain and wear continually the strongest glasses.

"After about a year of service on the U. S. receiving ship *Vermont*, New York Navy Yard, I was ordered to the U. S. S. *Omaha*, as a watch officer in the summer of 1872, and proceeded to the South Pacific Station. On this service I found great inconvenience and was at great disadvantage through my defective eyesight, especially in stormy weather, when I could not wear glasses.

"This led to a medical survey, and I was ordered before the retiring board at Washington, which board, through a misapprehension of the circumstances, rendered their report contrary to the facts above stated, whereby I have suffered great injustice and loss.

"Partial justice was done me in 1873 through the intervention of Hon. Amos Townsend, member of Congress from Cleveland, Ohio, who caused my name to be transferred from the furlough pay list to the one-half pay retired list, and the wrong and injustice done me would have been entirely rectified at that time but for a misunderstanding on his part as to the equities of my case.

"I now respectfully ask that I be transferred to the 75 per cent of sea pay retired list, to date from the time of my retirement, July 22, 1874, and that I be reimbursed for the difference in pay between 75 per cent of my sea pay as lieutenant at the time of my retirement, to which I am and have been justly and legally entitled, and the lesser rate of pay which I have received.

"Very respectfully, LIEUT. J. E. MORSE,
"*United States Navy.*"

Lieutenant Morse also submits this affidavit:

STATE OF NEW YORK, *City and County of New York, ss:*

Jerome E. Morse, being duly sworn, says that he is a lieutenant in the United States Navy, on the retired list; that to the best of his knowledge and belief the incapacity for which he was placed on the retired list, extreme near-sightedness, resulted in the line of duty from sickness and exposure and other incidents of service.

That this incapacity originated from a severe intermittent malarial fever contracted while serving on the U. S. S. *Wasp* about the year 1869, on the Paraguay and other inland rivers of South America.

That this incapacity was very much aggravated by service on the U. S. monitor *Dictator*, at Key West, Fla., and that he knows no other cause or incident, hereditary or otherwise, outside of the line of active service, which could or did originate, lead to, or cause said incapacity for active service in the United States Navy.

JEROME E. MORSE.

Sworn and subscribed to before me this *30th day of March, 1888.*

[SEAL.] G. A. ACKERMAN,
Notary Public (62), New York County.

STATE OF NEW YORK, *City and County of New York, ss:*

I, James A. Flack, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that G. K. Ackerman, before whom the annexed deposition was taken, was at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said

State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 10th day of April, 1888.

[SEAL.] JAMES A. FLACK, *Clerk.*

Appended is the report of the medical survey:

Report of a medical survey held on board the U.S.S.Omaha, at Callao, Peru, March 30, 1874, upon Lieut. E. Morse, United States Navy.

* * * * * * *

Present condition.— Unfit for service; can read Snellen's No. 3 test type at 13 inches, No. 8 at 15½, and No. 30 at 36 inches. The acuteness of vision is the same in both eyes. The patient is, as proved by the above tests, very shortsighted, and the disease is progressive.

* * * * * * *

Origin.—His eyesight was normal. He first noticed shortsightedness in his case when attached to the U. S. S. *Pawnee*, South Atlantic Station, in 1867, and the disease has been gradually increasing, but the progress has been greatest during the last year, so that in every port he is obliged to buy stronger glasses. He further states that he is unable to refer the origin of his disease to any particular service or special circumstance attending his naval career, but believes that it originated from the ordinary performance of duty afloat during the last seven years.

The board of medical survey accepts Lieutenant Morse's statement as evidence, and is of the opinion that his disease originated in the service and in the line of duty. We know that he is subject to severe attacks of facial neuralgia of malarial origin, from exposure to climatic influence on

duty "in the harbor of Montevideo in 1869," and it is possible that his shortsightedness had its origin in an attack of intermittent fever, of which he suffered at that time; it certainly had its beginning at that time.

JOHN C. SPEAR,
Surgeon, U. S. N.
P. FITZSIMMONS,
Assistant Surgeon, U. S. N.
REMUS C. PEARSON,
Assistant Surgeon, U. S. N.

Approved March 21, 1874.

JOHN J. ALMY,
Rear-Admiral, United States Naval Force,
South Pacific Station.

ity incident to the service are entitled under the act of June 29, 1906.

There being nothing in the record to show that any injustice was done by the Retiring Board in retiring an officer of the navy for disability not originating in the line of duty, a special act of Congress subsequently passed for his relief and placing him on a list by which he receives increased pay, will not be construed as one relieving him from wrong and injustice and giving him the benefits of officers retired for disabilities incident to the service.

46 Ct. Cl. 361, affirmed.

THE facts, which involve the construction of the acts of Congress relating to pay of retired naval officers, are stated in the opinion.

Mr. George A. King, with whom *Mr. Wm. B. King* was on the brief, for appellant.

Mr. Frederick De C. Faust, Acting Assistant Attorney General, for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

The question in this case is whether the appellant, an officer on the retired list of the Navy, is entitled to the difference between the retired pay of a lieutenant and that of a lieutenant commander, from the date of the passage of the act of June 29, 1906, 34 Stat. 553, 554, c. 3590. At the time of his retirement he held the rank of lieutenant. The act referred to provides that any officer not above the grade of captain, whose name is borne on the official register of the Navy, and having certain other qualifications that the appellant concededly possesses, "and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service . . . may, in the discretion of the President, by and with the

advice and consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement."

Appellant had served in the Navy during the Civil War, and thereafter until July 22, 1874, when he was retired on furlough pay upon approval by the President of the finding of a Retiring Board that he was incapacitated for performing the duties of his office, and that the incapacity did not originate in the line of duty. The Retiring Board acted under § 23 of the act of August 3, 1861, 12 Stat. 287, 291, c. 42, now §§ 1448 to 1457 of the Revised Statutes. Afterwards, and on July 17, 1878, under the provisions of § 1594, Rev. Stat., he was transferred by the President, with the consent of the Senate, from the furlough to the retired-pay list, and thereafter received 50 per centum of the highest sea pay of his grade as lieutenant.

On June 26, 1902, he was transferred from the half-pay list to the three-quarters pay list, under the authority of a special act of Congress, approved June 10, 1902, 32 Stat. 1444, c. 1075, which reads as follows: "Be it enacted, etc., that the Secretary of the Navy be, and he is hereby, authorized and empowered to transfer Lieutenant Jerome E. Morse, of the retired list of the United States Navy, from the half-pay list of the seventy-five per centum pay list of retired officers, under section fifteen hundred and eighty-eight of the Revised Statutes of the United States; and the said transfer shall take effect as of the passage of this Act."

The section of the Revised Statutes therein referred to is as follows: "Sec. 1588. The pay of all officers of the Navy who have been retired after forty-five years' service after reaching the age of sixteen years, or who have been or may be retired after forty years' service, upon their own application to the President, or on attaining the age

of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea-pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the sea-pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement."

In January, 1907, appellant was nominated by the President for advancement to the grade of lieutenant commander on the retired list, in accordance with the provisions of the act of June 29, 1906, first above mentioned; the nomination was confirmed by the Senate, and the appellant was shortly afterwards advised in the usual mode by the Secretary of the Navy that he had been advanced from June 29, 1906, the date of the passage of the act.

The question is, whether the appellant (having all other qualifications for advancement under the act referred to) is to be considered as having been retired for disability incident to the service; and this depends upon the question whether the special act of June 10, 1902, operated to change his status from that of an officer retired for incapacity not incident to the service, to that of an officer retired for incapacity incident to the service.

The Court of Claims resolved this question against the claimant (46 Ct. Claims, 361). This we think is correct. The case is in effect governed by *Potts* v. *United States*, 125 U. S. 173, and *United States* v. *Burchard*, 125 U. S. 176.

The argument to the contrary is based upon the act of June 10, 1902. Its title is—"An act for the relief of Lieu-

MORSE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 274. Argued May 2, 1913.—Decided May 26, 1913.

A naval officer who had been retired under § 23 of the act of 1861 for disability not originating in the line of duty and afterwards transferred to the three-quarter pay list under § 1558, Rev. Stat., by authority of a special act of Congress, *held*, not entitled to advanced pay to which officers retired on account of wounds or disabil-

tenant Jerome E. Morse." This is invoked as an aid in interpreting the meaning of the enactment. The query propounded is, "What was the relief that Congress intended to grant the claimant unless it was relief from the consequences of the wrong and injustice that had been done him by the Retiring Board in 1874?" But this query begs the whole question. There is nothing in the record to show that any wrong or injustice was done by the action of the Retiring Board. The answer to the query is, we think, written in unmistakable terms in the act itself, and in § 1588, Rev. Stat., to which it refers. The intended relief consisted in an increase of pay, measured by the difference between half-pay and three-quarters pay, for the rank that he held at the time of his retirement; that is to say, for the rank of lieutenant.

The case differs widely from *McLean* v. *United States*, 226 U. S. 374, and is not controlled by it.

Judgment affirmed.